(19,264.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 613.

EDWARD JASTER, SENIOR, PLAINTIFF IN ERROR,

vs.

F. M. CURRIE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 15, 1904.

1 EDWARD JASTER, SR., v. F. M. CURRIE. } No. 12840.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 6th day of January, A. D. 1903.

Present: Hon. J. J. Sullivan, chief justice; Hon. Silas A. Holcomb, judge; Hon. S. H. Sedgwick, judge.

Attest: LEE HERDMAN, *Clerk.*

Be it remembered, that, on the 4th day of August, A. D. 1902, there was filed in the office of the clerk of said supreme court a certain petition in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

EDWARD JASTER, SR., Plaintiff in Error, v. F. M. CURRIE, Defendant in Error. } Petition in Error.

2 Edward Jaster, Sr., plaintiff in error, complains of F. M. Currie, the defendant in error, and alleges that heretofore, to-wit, on the 7th day of June, A. D. 1902, in a certain cause then pending in the district court of Custer county, Nebraska, wherein the plaintiff in error was plaintiff and the defendant in error was defendant, the said defendant did by the consideration of said court recover against the plaintiff a final judgment that he go hence without day and recover his costs, taxed in the sum of $16.80; a transcript of the records and proceedings in said cause is hereto attached and filed herewith. Plaintiff in error alleges that there is error in said record and proceedings in this, to-wit:

First.

The court erred in overruling the demurrer of plaintiff to the amended answer of defendant.

Second.

Judgment should have been rendered sustaining the demurrer of plaintiff to the amended answer of defendant.

Third.

The court erred in rendering judgment in favor of the defendant and against plaintiff.

Fourth.

The judgment should have been rendered in favor of plaintiff on the issue of law joined on said demurrer.

To all of which rulings and decisions the plaintiff duly excepted at the time.

Wherefore, plaintiff in error prays that said judgment may be reversed and held for naught, and that he may be restored to all things lost thereby and may recover his costs.

SIMON CAMERON &
O. A. ABBOTT,
Att'ys for Plaintiff in Error.

Endorsed: 12840. Edward Jaster, Sr., *v.* F. M. Currie. Petition in error. Supreme court of Nebraska. Filed Aug. 4, 1902, Lee Herdman, clerk.

3 And on the same day there was filed in the office of the clerk of said supreme court a certain transcript in words and figures following, to-wit:

Pleas before the district court of the twelfth judicial district, held in and for the county of Custer and State of Nebraska, at a term thereof begun and holden in the city of Broken Bow, in said county and State, on the 26th day of May, 1902.

Present: Hon. H. M. Sullivan, judge, C. T. Orr, clerk.

That, on the 13th day of September, 1900, there was filed an action in the office of the district court in the following case:

EDWARD JASTER, SR., Plaintiff,
vs.
F. M. CURRIE, Defendant.

And now, on this 7th day of June, 1902, this cause came on to be heard before the court, the Hon. H. M. Sullivan, judge, presiding, this being one of the days of the regular May, 1902, term of the district court, held in and for the county of Custer, in the twelfth judicial district of Nebraska, the plaintiff appearing by Simon Cameron, his attorney, and the defendant appea-ing by C. L. Gutterson, his attorney.

And the plaintiff in granted leave to file substituted amended petition, the defendant to refile original amended answer, and the plaintiff to file demurrer to amended answer.

And afterwards, on the 7th day of June, 1902, there was filed in the clerk's office the following substituted amended petition,
4 to-wit:

In the District Court of Custer County, Nebraska.

EDWARD JASTER, SR., Plaintiff,
vs.
F. M. CURRIE *et* —, Defendant-. } Substituted Amended Petition.

1. The plaintiff complains of the defendant and alleges that of the 9th day of May, 1900, the same being one of the days of the regular May, 1900, term of the court of common pleas, being a court of record and general jurisdiction within and for the State of Ohio and in the county of Trumbull in an action there pending in said court in favor of said plaintiff and against said defendant, said plaintiff recovered a judgment against said defendant for the sum of $861.00 and costs of suit, taxed at $100.00, and that said judgment bears interest at the rate of ten per cent. per annum.

2. Said judgment has not been paid or any part thereof, and there is now due from the defendant to the plaintiff thereon the sum of $861.00 and interest thereon at the rate of ten per cent. per annum from May 9th, 1900, with costs, taxed at $100.00.

3. A duly certified transcript of said judgment and proceedings is hereto attached, marked "Exhibit A" and hereby made a part of this petition.

Plaintiff alleges that summons in said action in the court of common pleas in and for Trumbull county, Ohio, was served upon said defendant, F. M. Currie, by the sheriff of said Trumbull county on the 7th day of September, 1899, after 8 o'clock, a. m. of
5 said day.

That, on October 6th, 1899, in said action said F. M. Currie filed a motion to set aside the sheriff's return of said service of summons, of which motion the following is a copy:

STATE OF OHIO, *Trumbull County,* } *ss:*

In the Court of Common Pleas.

EDWARD JASTER, SR, Plaintiff,
vs.
FRANK M. CURRIE ET AL., Defendants. } Motion for the Sole and Only Purpose of Setting Aside the Sheriff's Return and Service of Summons.

Said defendant, Frank M. Currie, appearing solely for the purpose of this motion and not intending thereby or hereby to enter his

appearance, moves that the sheriff's return of service of summons be set aside.

By GILBERT & CHRYST,
Attorneys for said Frank M. Currie.

That, on December 8th, 1899, the following notice was filed in said case with acknowledgement of service by said Edward Jaster, duly endorsed thereon, to-wit:

THE STATE OF OHIO, } ss:
Trumbull County, }

In the Court of Common Pleas.

EDWARD JASTER, SR., Plaintiff,
vs.
FRANK M. CURRIE ET AL., Defendants. } Notice of Motion.

6 Plaintiff is hereby notified that on the 13th day of December, 1899, at nine o'clock a. m. defendant, F. M. Currie, will apply to Hon. T. T. Gilmer, one of the judges of said court, at the court room for an order to set aside the sheriff's return of service of summons in said action and affidavits will be used on said hearing.

GILBERT & CHRYST,
Attorneys for F. M. Currie.

Dated December 8th, 1899.

Service accepted this 7th day of December, 1899.

T. H. GILMER,
Attorney for Edward Jaster, Sr."

That affidavits were filed in support of said motion. That at the October, 1899, term of said court of common pleas, plaintiff was allowed until Jan. 1st, 1900, to file affidavits and the defendant until Jan. 29th, 1900, to file affidavits in rebuttal and case continued over the term.

That at the January, 1900, term of said court of common pleas hearing was had on said motion of F. M. Currie to set aside service of summons on defendant, Currie, and said motion overruled, to which defendant excepted and statutory time given to prepare and file bill of exceptions.

That the issue raised and tried by the affidavits in support of said motion, the counter affidavits and affidavits in rebuttal was that said court of common pleas in and for Trumbull county, Ohio, had no jurisdiction over the person of defendant Frank M. Currie for the reason that said Frank M. Currie had gone to said Trumbull county, Ohio, in response to the service of a motion to take deposition in said action pending in the district court of Custer county,

Nebraska, in which Edward Jaster, Sr., plaintiff herein, was plaintiff and Frank M. Currie, defendant herein with others, was defendant. Said depositions to be taken and were taken on Sep-
7 tember 5th, 1899, in behalf of said plaintiff, Edward Jaster, Sr.

That no supersedeas bond was filed by defendant, Frank M. Currie. That at the April, 1900, term of the circuit court of the 7th judicial district, held in and for Trumbull county, Ohio, the decision of the court of common pleas in overruling said motion of said Currie was sustained and affirmed, to which ruling defendant Currie duly excepted.

That — the May, 1900, term of said court of common pleas said cause of Edward Jaster, Sr., *vs.* F. M. Currie came up on special mandate from the circuit court of said Trumbull county and defendant Currie being in default for answer or demurrer, jury being waived, judgment was duly entered in said court of common pleas in favor of said plaintiff, Edward Jaster, Sr., and against said defendant, F. M. Currie, in the sum of $861.00 and costs of suit.

That said ruling of said circuit court of said Trumbull county, Ohio, in affirming the decision of said court of common pleas in said action of Jaster *vs.* Currie was duly prosecuted by writ of error by said F. M. Currie, defendant, to the supreme court of the State of Ohio and since the commencement of this action the supreme court of the State of Ohio has rendered its decision sustaining and affirming the decision of the court of common pleas and the circuit court of Trumbull county, Ohio, in overruling said motion of Frank M. Currie.

"EXHIBIT A."

Record Book No. 114, page 574.

Pleas before the court of common pleas within and for the county of Trumbull and State of Ohio, at a term of said court be-
8 gun and continued at the court house, in the city of Warren, on Monday, May 7th, A. D. 1900.

EDWARD JASTER, SR., *vs.* F. M. CURRIE ET AL. } App. Doc. 23, Page 7095.

Be it remembered that, heretofore, to-wit, on September 7, 1899, came the pa*l*intiff and filed in the office of clerk of said court his petition which is in words and figures following, to-wit:

THE STATE OF OHIO, *Trumbull County*, } ss:

In the Court of Common Pleas.

EDWARD JASTER, SR., Plaintiff,
vs.
F. M. CURRIE, AMOS PERKINS, and WILLIAM PERKINS. Defendants. } Petition.

First Cause of Action.

Plaintiff, for his first cause of action, says that the defendants, Amos Perkins, and William Perkins, as makers, and F. M. Currie, as endorsers, are indebted to him on a promissory note of which the following is a true copy.

$200.00. SARGENT, NEBRASKA, *January 10th*, 1893.

On the first day of January, 1894, for value received, I, we, or either of us, promise to pay to the order of F. M. Currie, two hundred dollars, at the office of Frank M. Currie, Sargent, Nebraska, with interest at ten per cent. per annum from date until paid.

9 The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note, and all defense on the ground on an entension of the time of its payment that may be given by the holders, to them or either of them.

AMOS PERKINS,
WILLIAM PERKINS.

Indorsed: Pay to the order of E. Jaster, Sr., F. M. Currie.

There are no other indorsements on said note and no part of the same has been paid.

Second Cause of Action.

Plaintiff for his second cause of action, says that the defendants Amos Perkins and William Perkins, as makers, and F. M. Currie, as endorsee, are indebted to him on a promissory note of which the following is a true copy:

$200.00. SARGENT, NEBRASKA, *January 10th*, 1893.

On the first day of January, 1895, for value received, I, we, or either of us, promise to pay to the order of F. M. Currie, two hundred dollars at the office of Frank M. Currie, Sargent, Nebraska, with interest at ten per cent. per annum from date until paid.

The drawers and endorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note, and all defense on the ground of an extension of the time of its payment that may be given by the holders, to them or either of them.

AMOS PERKINS.
WILLIAM PERKINS.

Endorsed: Pay to the order of E. Jaster, Sr., F. M. Currie.

10 There have been no payments on said note.

Third Cause of Action.

Plaintiff for his third cause of action says that the defendants, Amos Perkins and William Perkins, as makers and F. M. Currie, as endorser, are indebted to him on a promissory note of which the following is a true copy:

$200.00. SARGENT, NEBRASKA, *January 10th*, 1893.

On the first day of January, 1896, for value received, I, we, or either of us, promise to pay to the order of Frank M. Currie $200, Sargent, Nebraska, with interest at ten per cent. per annum from date until paid.

The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note and all defense on the ground of an extention of the time of its payment that may be given by the holders to them or either of them.

AMOS PERKINS.
WILLIAM PERKINS.

Endorsed: Pay to the order of E. Jaster, Sr., F. M. Currie.

There are no other endorsement- on said note and no payments have been made thereon.

Plaintiff says that he purchased said notes in the regular course of business, for valuable consideration, and before any one of them was due; that there is due to him from defendant on his first cause of action $200.00 and interest at the rate of 10 % from January 10th, 1893.

11 That there is due him on his second cause of action from said defendants the sum of $200.00 and interest from January 10th, 1893, at the rate of ten per cent. per annum.

That there is due him on his third cause of action the sum of $200.00 at the rate of 10 % from January 10th, 1893.

Wherefore, plaintiff asks judgment against said defendants in the

aggregate amount of $600.00 and interest at the rate of 10 % per annum from January 10th, 1893.

T. H. GILLMER,
Attorney for Plaintiff.

THE STATE OF OHIO, *Trumbull County,* } ss:

Before me, a notary public in and for said county, personally came T. H. Gillmer, who on oath says that he is attorney for plaintiff in this action; that the basis of this action are written instruments for the payment of money only and are now in the possession of affiant; that the statements made in this petition are, as affiant believes, true.

T. H. GILLMER.

Signed in my presence and sworn to before me this 6th day of September, A. D. 1893.

E. E. ROBERTS,
Notary Public.

[SEAL.]

September 7th, 1899.—Præcipe filed, and is in words and figures following, to-wit:

EDWARD JASTER, SR., Plaintiff,
v.
F. M. CURRIE, AMOS PERKINS, and WILLIAM PERKINS, Defendants. } Præcipe.

12 To the clerk:

Issue summons to the sheriff of Trumbull county for F. M. Currie, endorsed, amount claimed $600.00 and interest from January 10th, 1893, at 10 %.

T. H. GILLMER.

September 7th, 1899.—Summons issued to sheriff, and is in words and figures following, to-wit:

THE STATE OF OHIO, *Trumbull County,* } ss:

To the sheriff of the county of Trumbull:

You are commanded to notify F. M. Currie that he with others has been sued by Edward Jaster, Sr., plaintiff, in the court of common pleas of Trumbull, and that unless he answer by the 7th day of October, A. D. 1899, the petition of said plaintiff against him, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 18th day of September, A. D. 1899.

Witness my hand and the seal of said court at the court house in Warren, in said county, this 7th day of September, 1899.

[SEAL.] W. B. SWAGER, *Clerk.*

September 18th, 1899.—Sheriff's return filed and is in words and figures following, to-wit:

Sheriff's Return.

THE STATE OF OHIO, } ss:
Trumbull County, }

Received this writ September 7th, A. D. 1899, at 8 o'clock a. m. and pursuant to its command on the same day I summoned
13 the within named F. M. Currie by delivering to him personally a true and certified copy hereof with the endorsements thereon.

F. E. CALDWELL, *Sheriff.*

Sheriff's office, Warren, Ohio, September 18th, 1899.

October 6th, 1899.—Motion filed and is in words and figures following, towit:

STATE OF OHIO, } ss:
Trumbull County, }

In the Court of Common Pleas.

EDWARD JASTER, SR., Plaintiff,
vs.
FRANK M. CURRIE ET AL., Defendants.

Motion for the Sole and Only Purpose of Setting Aside the Sheriff's Return on Service of Summons.

Said defendant, Frank M. Currie, appearing for the purpose of this motion, and not intending thereby or hereby to enter his appearance, moves that the sheriff's return of service of summons be set aside.

By GILBERT & CHRYST,
Attorneys for said Frank M. Currie.

December 8th, 1899.—Notice filed and is in words and figures following, to-wit:

THE STATE OF OHIO, } ss:
Trumbull County, }

In the Court of Common Pleas.

EDWARD JASTER, SR., Plaintiff,
v.
F. M. CURRIE, AMOS PERKINS, and WILLIAM Perkins, Defendants. } Notice of Motion.

14 Plaintiff is hereby notified that on the 13th day of December, 1899, at nine o'clock a. m. defendant, F. M. Currie, will apply to Hon. T. I. Gillmer, one of the judges of said court, at the court room, for an order to set aside the sheriff's return of service of summons in said action, and affidavits will be used on said hearing.

GILBERT AND CHRYST,
Attorneys for F. M. Currie.

Dated December 8th, 1899.

Service accepted this 7th day of December, 1899.

T. H. GILLMER,
Att'y for Edward Jaster, Jr.

Journal 43, page 364, October term, 1899, to-wit, Friday, December 26th.

It is ordered that plaintiff be allowed until January 1st, 1900, to file affidavits, and defendant be allowed until January 29th, 1900, to file affidavits in rebuttal and this cause continued until next term of court.

Journal 43, page 431, January term, 1900, to-wit, Monday, February 26th.

This cause came on to be heard on the motion of defendant F. M. Currie, to set aside the service of summons made upon him and the court upon consideration overrules the same, to which ruling of the court in overruling said motion defendant excepts and has statutory time in which to prepare and file bill of exception.

Journal 43, page 467, January term, 1900, to-wit, March 17th.

Now comes the defendant (plaintiff in error) by his attorneys and presents to the court his certain bill of exceptions herein, which being found by the court to be true, is signed, sealed and on motion of plaintiff in error ordered to — made a part of the record in this case.

15 *Proceedings in Circuit Court.*

March 19th, 1900.—Petition in error filed and is in words and figures following, to-wit:

THE STATE OF OHIO, } ss:
Trumbull County, }

In the Circuit Court.

FRANK M. CURRIE, Plaintiff in Error,
v.
EDWARD JASTER, SR, Defendant in Error. } Petition in Error.

Plaintiff in error says that, at the January term, A. D. 1900, of the court of common pleas of Trumbull county, Ohio, in an action then pending therein, wherein plaintiff in error was defendant, and defendant in error was plaintiff, said court overruled a motion to set aside the sheriff's return of service of summons filed by plaintiff in error in said action, a transcript of the docket and journal entries whereof, and pleading, affidavits and exhibits filed in said action are filed herewith.

There is error in said record and proceedings in this, to-wit:

1st. Said court erred in overruling said motion.

2nd. That overruling said motion was contrary to law and the evidence.

3rd. That under the law and the evidence said motion should be sustained.

4th. Other errors of law and fact appearing on the record.

Plaintiff in error, therefore, prays that said order may be reversed and he be restored to all things he has lost by reason thereof.

FRANK M. CURRIE,
By his attorneys, GILBERT AND CHRYST.

16 Circuit Court Journal 2, page 160, April term, A. D. 1900, viz., Friday, April 13.

This cause came on to be heard to the court upon the petition in error and was argued by counsel and submitted to the court on the errors assigned in the petition in error filed herein, and the court having carefully considered said cause finds that there was no error in the proceedings of the court of common pleas in overruling the motion of defendant therein to set aside the return of the sheriff and dismiss the cause, but the court do find that said proceedings in said court of common pleas *was* regular and in accordance with law, and hereby affirm the same.

It is therefore considered and adjudged by the court that the proceedings in the court of common pleas in overruling plaintiff in error's motion be and the same hereby is affirmed and that defendant in error recover from the plaintiff in error his costs herein taxed, and that plaintiff in error pay his own costs, for which execution is awarded, and to the said finding and the said judgment of the court, the plaintiff in error excepts.

April 24th, 1900, mandate sent to common pleas court.

Common Pleas Court.

April 24th, 1900.—Mandate filed and is in words and figures following, to-wit:

Mandate from the Circuit Court.

THE STATE OF OHIO, } ss:
Trumbull County, }

Circuit Court.

At a term of the circuit court, within and for the county of Trumbull, in the State of Ohio, begun and holden before Hon.
17 W. W. Frazier, Hon. P. A. Laubie, Hon. J. B. Burrows, presiding judges, at Warren, on the 3rd day of April, A. D. 1900, among other proceedings then and there had by and before said court, as appears on its journal, were the following, to-wit:

FRANK M. CURRIE } No. 348.
vs.
EDWARD JASTER, SR. }

This cause came on to be heard to the court on the petition in error and was argued by counsel and submitted to the court on the errors assigned in the petition in error, filed herein, and the court having carefully considered said cause finds there was no error in the proceedings of the court of common pleas in overruling the motion of defendant therein to set aside the return of the sheriff and dismiss the cause, but the court do- find that said proceedings in the court of common pleas were regular and in accordance with law, and hereby affirms the same. It is therefore considered and adjudged by the court that the proceedings in the court of common pleas in overruling plaintiff in error's motion be and the same hereby is affirmed and that defendant in error recover from the plaintiff in error his costs herein taxed and that plaintiff in error pay his own costs, for which execution is awarded and to the said findings and the said judgment of the court the plaintiff in error excepts.

Ordered that a special mandate be sent to the court of common pleas of said county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the court of common pleas for said county for entry, etc.

18 I, W. B. Swager, clerk of the circuit court of Ohio, within and for Trumbull county, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court *court*.

Witness my hand and the seal of said court, this 24th day of April, 1900.

[SEAL.] W. B. SWAGER, *Clerk*.

THE STATE OF OHIO, } ss:
County of Trumbull, }

Circuit Court of Ohio within and for said County.

To the honorable court of common pleas within and for said county, Greeting:

We do hereby command you that you proceed without delay to carry into execution the within and foregoing judgment of your circuit court in the case of Edward Jaster, Sr. *vs.* Frank M. Currie *et al.*

Witness, W. B. Swager, clerk of our circuit court, at Warren, Ohio, this 24th day of April, 1900.

[SEAL.] W. B. SWAGER, *Clerk*.

Journal 44, page 10, May term, 1900, A. D. 1900, viz., May 9th.

This cause coming to the court on special mandate from the circuit court of said Trumbull county, and it appearing to the court that the defendant is in default for answer or demurrer and that he does not wish to plead herein, and said cause then comes on to be heard to the court, jury herein being waived, and the court
19 finds that the allegations in the petition are confessed by the said defendant to be true and that the said defendant is indebted on the several causes of action stated in the petition as therein set forth in the amount of $861.00.

It is, therefore, considered and adjudged by the court that the plaintiff recover from the defendant, Frank M. Currie, the said sum of eight hundred, sixty-one dollars and his costs herein taxed and execution is awarded.

Authenticated Copy of Record.

THE STATE OF OHIO, }
Trumbull County, } ss:

I, W. B. Swager, clerk of the court of common pleas within and for said county of Trumbull and State of Ohio, having the custody of the files, journals, and records of said court, the said court being a court of record and of general jurisdiction, do hereby certify that the foregoing is a full and true copy of the complete record of the proceedings of the said court of common pleas in the cause No. 7095, wherein Edward Jaster, Sr. was plaintiff and F. M. Currie, *et al.* were defendants, as the same remains of record at page 574 of vol. 114, Law Records of said county, in my office and in my custody.

Witness my hand and the seal of said court at Warren, Ohio, this 14th day of August, A. D. 1900.

W. B. SWAGER, *Clerk.*

10 doc. stamp and seal.

STATE OF OHIO, }
Trumbull County, } ss:

I, Thomas T. Gillmer, one of the judges of the court of common pleas, within and for the 2nd sub-division of the 9th judi-
20 cial district of the State of Ohio, which said sub-division includes the said Trumbull county, the said court being a court of record, and of general jurisdiction, do hereby certify that the said W. B. Swager whose genuine signature is attached to the foregoing certificate, was at the time of making and subscribing said certificate, and is now clerk of said court of common pleas, within and for said county of Trumbull, duly commissioned and sworn, and is the officer in whose custody said record is required to be kept by the laws of the State of Ohio, and is authorized by the law of said State to certify as aforesaid, and that his attestation aforesaid is in due form of law, and that to all acts so done by him full faith and credit are and ought to be given.

Signed by me and dated, at Warren, Ohio, this 14th day of August, A. D. 1900.

THOMAS GILLMER,
Judge as Aforesaid.

10 cent doc. stamp.

THE STATE OF OHIO, }
Trumbull County. }

I, W. B. Swager, clerk of the court of common pleas, within and for said county, do hereby certify that the Hon. T. I. Gillmer, whose

genuine signature is attached to the within certificate was at the time of subscribing the same and now is one of the judges of the court of common pleas within and for the 2nd subdivision of the 9th judicial district of the State of Ohio, which said sub-division includes the said Trumbull county, duly commissioned and qualified, and is now acting as such, and that full faith and credit are and ought to be given to all his official acts as such.

Witness my hand and the seal of said court, at Warren,
21 Ohio, this 14th day of August, A. D. 1900.

W. B. SWAGER, *Clerk.*

10 cent doc. stamp and seal.
From Record 114, page 574.

The plaintiff, therefore, prays judgment against the defendant for the sum of $861.00 with interest from May 9th, 1900, at the rate of ten per cent. per annum and costs of suit, taxed at $100.00, and all costs of this suit.

EDWARD JASTER, SR.,
By SIMON CAMERON,
His Attorney.

STATE OF NEBRASKA, } ss:
Custer County, }

Simon Cameron, being first duly sworn on oath, says that he is attorney for the plaintiff in the above entitled action, that the plaintiff is a non-resident of the State of Nebraska and is absent therefrom; that the facts set forth in the foregoing substituted amended petition are true as he verily believes.

SIMON CAMERON,
Attorney for Plaintiff.

Subscribed and sworn to before me this 7th day of June, 1902.
[SEAL.]

C. T. ORR,
Clerk Dist. Court.

Filed January 30th, 1901, and refiled June 7th, 1902.

In the District Court of Custer County, Nebraska.

WILLIAM JASTER, SR., Plaintiff,
vs.
F. M. CURRIE, Defendant. } Amended Answer.

22 Comes now the defendant in the above entitled action and for his amended answer to the amended petition of plaintiff filed herein, denies each and every allegation in said petition contained, save and except such as are in the manner hereinafter specifically admitted, and denies that the facts alleged in said petition constitute a cause of action.

Further answering. this defendant denies that there is due from this defendant to the said plaintiff the sum of $861.00, or any other sum whatever, and denies that he is indebted to the said plaintiff in any amount or upon any cause of action whatever.

Further answering, and for further defense to said action, this defendant alleges the fact to be that at the time of the commencement of this action in the court of common pleas in the county of Trumbull, State of Ohio, in which the pretended judgment described in plaintiff's petition was rendered, this plaintiff was a resident of Custer county, in the State of Nebraska, and had been a continuous resident of said county of Custer in the State of Nebraska, for a period of more than eight years and is still and always has been, since he first moved to the county, a *bona fide* resident of this county.

This defendant alleges the fact to be that said court of common pleas within and for said county of Trumbull, State of Ohio, which rendered said pretended judgment upon which this suit is brought, had no jurisdiction over the person of this defendant at the time said pretended judgment is claimed to have been rendered.

That about the 28th day of December, 1898, the said plaintiff in this suit brought an action in the district court of Custer county, Nebraska, against this defendant, together with William Perkins and Amos Perkins, the object and prayer of which action were to obtain a judgment against said William and Amos Perkins, as makers and this defendant as an endorser, was upon the identical notes upon which the pretended judgment was rendered, upon which plaintiff sues in this action.

23 That on June 5th, 1899, this defendant filed his separate answer in said action in said district court of Custer county, Nebraska.

That afterwards and on the 3rd day of August, 1899, said plaintiff coused to be served a notice upon the attorney of this defendant, that said plaintiff would take deposition of said Edward Jaster, Sr., before E. A. Reed, at Vernon, in said Trumbull county, in the State of Ohio, on the 5th day of September, 1899, between the hours of 10 o'clock a. m. and six o'clock p. m., which depositions was to be used in the trial of said action then pending in the district court of Custer county, Nebraska.

The defendant shows to the court that C. L. Gutterson was his attorney employed by him in the defense of said suit in Custer county, Nebraska, and that said attorney advised this defendant to go to the State of Ohio and be in attendance at the takeing of said depositions of said Edward Jaster, Sr., pursuant to said notice, and that this defendant in pursuance of said advice and for the express and only purpose of attending the takeing of the depositions of said Edward Jaster, Sr., *he* went to the State of Ohio and arrived in Trumbull county on the 4th day of September, 1899, and on the 5th day of September, 1899, the same being the day upon which deposition was to be taken, this defendant attended, before said notary public,

the taking of said deposition, and procured counsel to appear with him at the taking of said deposition.

That it was during the time between the taking of said deposition and the time that this defendant took the said train to leave for the State of Nebraska, that summons was served upon this defendant, in said action in Trumbull county, in which said pretended judgment was rendered.

24 That after completing the taking of said depositions on the evening of September 5th, 1899, this defendant went to the hime of his father near Latimer, in said Trumbull county, State of Ohio.

Defendant further states that he is and has been for years subject to attacks of nervous and sick headaches, and that they are usually caused from nervous excitement or by exhaustion from long journeys and other over-exertions.

Defendant further states that on the evening of the said 5th day of September, he suffered severely from one of these attacks, and that he spent the night with his father near Latimer, Trumbull county, Ohio.

That on the 6th day of September, he went to Latimer crossing, which was the nearest railway station, for the purpose of returning to the State of Nebraska, and after consulting the railroad time table and talking to the agent as to the best and most expeditious route by which he could return to his home in Nebraska, he learned that the through train from Pittsburg to Ashtabula, if it could be stopped at Latimer, would afford him the most expeditious means of making the return trip to Nebraska, and that he would save time by taking said train instead of any other train that he could take.

That he then and there asked the agent to telegraph to headquarters to try to have the train stopped at Latimer that he might take the same. That said agent informed him that it was *them* too late that day and it would be impossible to secure the stoppage of said train so that he might take it that day. But upon request of this defendant said agent agreed that he would make arrangements and get permission from headquarters to stop said train on the 7th day of September.

25 That pursuant to the request of this defendant and the permission of said agent, train No. 218, being a through train, from Pittsburg, Pa., to Ashtabula, Ohio, was stopped at Latimer crossing at 1:17 on the night of September 7th, or rather on the morning of September 8th, 1899, to allow this defendant to board said train.

That said train arrived at Ashtabula in time to make connections with train No. 15 on the Lake Shore and Michigan Southern railway, bound for Chicago and said connection was made at Ashtabula within a few moments after reaching Ashtabula upon said train number 218, this defendant took said train number 15, on said Lake Shore and Michigan Southern railway and arriving in Chicago about 3 o'clock in the afternoon of September 8th, this de-

fendant then took the earliest train on the Burlington road which left Chicago at 5:50 in the evening of September 8th and arrived in Omaha at 8:05 on the morning of September 9th.

This defendant then took the train at Omaha at 8:40 a. m. and arrived at Arcadia, Nebraska, at 4:45 on the evening of September 9th.

That he there hired a team and drove fourteen miles to Wescott Nebraska, and there he hired a saddle horse and rode six miles to his ranch where his family was then living.

This defendant further alleges that he was informed by the railroad agent at Latimer, and that he also learned from the railroad time table and time cards which he consulted that there was no other train that he could have taken on the 6th and have made as quick time as by taking train number 218, which train he did take. Had he taken any of the other trains which passed through Latimer except the one he did take, he would have been laid over and have had to wait at Ashtabula and at Chicago, so that he would not have arrived home so soon into a day as by waiting until the 7th
26 in order to get the through train from Pittsburg. In other words, that the delay in Trumbull county, Ohio, made by this defendant in order to take said train number 218 hastened his arrival in Nebraska one day.

This defendant further alleges the fact to be that he made no unnecessary delay or any delay whatever in immediately leaving the State of Ohio to return to the State of Nebraska after he had attended the taking of said depositions, and that in going to the State of Ohio from the State of Nebraska he only spent the necessary time in the State of Ohio to properly look after and guard his interests in the taking of said depositions, which was taken for the purpose of being used in the action aforesaid, which was brought in the district court of Custer county, Nebraska, and, therefore, this defendant alleges that said court by reason of the service of said summons upon this defendant, while this defendant was in the State of Ohio and in the county of Trumbull for the sole and only purpose of attending judicial proceedings, to-wit: the taking of said depositions in said case pending in said district court of Custer county, Nebraska, had no jurisdiction whatever over the person of this defendant.

This defendant further alleges the fact to be that he never at any time entered a general appearance in said suit brought in Trumbull county, State of Ohio.

For a further defense this defendant shows to the court that this defendant is now and for over eleven years last past has been a continuous and *bona fide* resident of the county of Custer and State of Nebraska.

That in September, 1899, there was pending in the district court of Custer county, Nebraska, an action in the name of Edward Jaster, Sr., plaintiff, against William Perkins and Amos Perkins and this defendant, in which said action judgment was asked upon the iden-

tical cause of action upon which the judgment described in plaintiff's petition was attempted to be rendered.

27 That in said action in said Custer county, Nebraska, this defendant had filed an answer setting up a defense to said suit.

That in said action pending in said Custer county, Nebraska, this defendant had employed C. L. Gutterson as his attorney to defend said sut.

That on the 3rd day of August, 1899, a notice was served upon said attorney of this defendant by the plaintiff or the plaintiff's attorneys giving notice that the deposition of said Edward Jaster, Sr., would be taken at Vernon, in Trumbull county, State of Ohio, before E. A. Reed, on the 5th day of September, 1899.

That said deposition was to be used in the trial of said action pending in the district court of Custer county, Nebr.

This defendant alleges the fact to be that the service of notice to take said deposition was done fraudulently and willfully for the fraudulent purpose of enticing and inducing this defendant to go to the State of Ohio that said plaintiff might obtain service upon him in said State and try the issues in said action in the State of Ohio, instead of in the State of Nebraska.

That the action then pending in the district court of Custer county, Nebraska, was brought upon promissory notes which had been executed by the said Amos Perkins and William Perkins to this defendant and assigned and endorsed by this defendant to the said plaintiff herein, and the suit in Trumbull county, Ohio, in which the pretended judgment alleged in plaintiff's petition in this action was tendered was brought upon the identical notes upon which the action was brought here in Custer county, Nebraska.

That said notice to take said depositions of the said Edward Jaster, Sr., was simply a ruse and was given for the purpose of misleading and inducing and enticing this defendant to go to

28 the said county of Trumbull and within the jurisdiction of the court of common pleas of Trumbull county, Ohio, and for the fraudulent purpose of attempting to get service in said State of Ohio upon this defendant and for no other reason.

This defendant further shows to the court that this defendant was ignorant of the fact that a fraud had been perpetrated upon him and believed that said notice to take said deposition was given in good faith by the plaintift, but this defendant did not discover that he had been imposed upon and fraudulently decoyed into the said State of Ohio by the said plaintiff by means of said notice to take said depositions for the fraudulent purpose of having said process served upon him until long after this defendant had filed the special appearance in said case brought against him in Ohio and after said special appearance had been submitted to the said court in the State of Ohio.

And this defendant alleges that by reason of his not discovering said fraud perpetrated upon him by the said plaintiff that he had

no opportunity to present to said court in Ohio the fact that he had been fraudulently deceived and decoyed into said State of Ohio for the fraudulent purpose of having said process served upon him.

This defendant further shows to the court that he now and always has had a valid defence to said notes which defence is as follows:

That said plaintiff is a resident of Trumbull county, Ohio, and that this defendant formerly lived in Trumbull county, Ohio, and was a neighbor and friend and acquaintance of said plaintiff.

This defendant further alleges that prior to the year 1889
29 the said plaintiff had loaned and invested certain moneys in Custer county, Nebraska, and that the same had been loaned for said plaintiff by plaintiff's son, who at that time lived in Custer county, Nebraska.

That about the year 1889, said son died and the said plaintiff came to this State and asked this defendant to look after his interests in said Custer county, and instructed this defendant that he desired that his moneys which were already invested in this State should be reloaned and kept at interest in this county.

That it was then and there agreed between the plaintiff and this defendant that this defendant take charge of the collection of the notes of said plaintiff, which said plaintiff then had for money which had been loaned in this county, and when the same should be collected by this defendant that the proceeds thereof should be reinvested by loaning the same, and it was then and there explained to the plaintiff by this defendant that this defendant was engaged in loaning money and that ofteimes he had notes of his own which were good and it was then and there agreed that at any time that this defendant saw fit that instead of sending new notes to the plaintiff that this defendant might send notes that he had himself against parties in liey of reloaning the money of said plaintiff.

The defendant alleges that the three notes sued upon were taken by this defendant from the said defendants Perkins and that said three notes were secured by a chattel mortgage on 14 head of horses and a considerable amount of farm machinery and implements, and was also secured by a second mortgage upon real estate and that at the time the same were taken, and long afterwards, said
makers of said notes, Amos Perkins and William Perkins,
30 had the reputation of promptly paying their debts and obligations, and were perfectly solvent and abundantly able to meet their obligations.

And this defendant alleges that at the time said notes were taken and at the time all of them matured there were perfectly good and collectible.

This defendant further alleges that shortly after said plaintiff had come to the county of Custer and placed his said business in the hands of this defendant, that this defendant made a collection for said plaintiff and in pursuance to his agreement with the said plaintiff he endorsed the three notes sued upon in this action and sent them to the plaintiff at his home in Ohio, together with the mort-

gages securing the same and explained the transaction and that said plaintiff expressed himself as perfectly satisfied with the same.

This defendant further alleges that it was distinctly agreed between this plaintiff and this defendant at the time this defendant agreed to handle the money of said plaintiff as his agent that in all cases where this defendant should turn over and endorse and deliver notes to the said plaintiff which this defendant had taken in his own name that there should be no personal liability as between said plaintiff and this defendant by reason of this defendant endorsing said notes so turned over to this plaintiff.

And this defendant alleges that there was no consideration whatever for the endorsing of said notes so endorsed by this defendant.

And this defendant further states that he has never received any remuneration whatever for services rendered, either for the collection of money above mentioned nor for reloaning the same.

31 Defendant further alleges the fact to be that since said notes so endorsed by him matured he has seen the plaintiff and visited with him, both in this State and in the State of Ohio, where the plaintiff resides, and that plaintiff never at any time intimated to this defendant that he should in any way look to this defendant for the said notes or any part thereof.

This defendant further shows to the court that at the time said notes were taken and at the time the same were endorsed over to the plaintiff, and at the time the same matured, the said chattel mortgage securing the said notes *were* abundant security and that the 14 head of horses which were included in said mortgage were of the reasonable value of $1000.00, and the farm machinery which was also covered by said mortgage was of the reasonable value of $500.00 and at the time said notes matured, that said security was good.

This defendant further alleges that after the first of said notes became due that he frequently advised said plaintiff to insist upon the payment of the same from the makers of the said notes or in case they did not pay them to foreclose said chattel mortgage.

Defendant further alleges that had said plaintiff used reasonable diligence in the collection of said notes or in the foreclosure of said mortgage, that said notes could have easily been collected and that the property covered by said chattel mortgage was ample and sufficient to pay the same, had the plaintiff exercised reasonable diligence in the collection of the same.

That by reason of the neglect of said plaintiff in the collection of said notes and the foreclosure of said chattel mortgage most of said personal property has been disposed of and is beyond the reach of said chattel mortgage.

Defendant, further answering, admits the allegations contained in paragraph 3 of said amended petition and admits that said allegations in said paragraph 3 truly and correctly show the record

32 of the proceedings in said court of common pleas and circuit court of said Trumbull county and in said supreme court of

Ohio, and that said court of common pleas is a court of record and general jurisdiction.

Wherefore, this defendant prays that said action may be dismissed and that it be the judgment of the court that this defendant go hence without day and that he have judgment against plaintiff for his costs in this action expended.

C. L. GUTTERSON,
Attorney for Defendant.

STATE OF NEBRASKA, } ss:
Custer County, }

C. L. Gutterson, being first duly sworn, deposes and says that he is the attorney for the defendant, F. M. Currie, named in the above entitled action; that said Currie is absent from the county of Custer.

Affiant further states that he knows the contents of the foregoing amended answer and believes the facts therein stated to be true.

C. L. GUTTERSON.

Subscribed in my presence and sworn to before me this 30th day of January, 1901.

[SEAL.] C. T. ORR,
Clerk Dist. Court.

And on the 7th day of June, 1902, there was filed the following demurrer by the plaintiff, to-wit:

In the District Court of Custer County, Nebraska.

33 EDWARD JASTER, JR., Plaintiff, vs. F. M. CURRIE, Defendant. } Demurrer to Amended Answer.

Comes now the plaintiff and demures to the amended answer of the defendant for the reason that the facts therein stated do not constitute a defense to plaintiff's cause of action, as set forth in his amended answer filed June 7th, 1902.

EDWARD JASTER, SR.,
By SIMON CAMERON,
His Attorney.

In the District Court of Custer County, Nebraska.

EDWARD JASTER, SR., Plaintiff, v. F. M. CURRIE, Defendant. } Journal Entry.

And now on this 7th day of June, 1902, again came the parties to this action by their attorneys and this cause coming on again to be

heard on the demurrer of plaintiff to amended answer of defendant, was argued by counsel, and the court being fully advised in the premises.

It is ordered that said demurrer be and the same is hereby overruled, to which ruling and decision of the court, plaintiff then and there duly excepted, and the plaintiff electing to stand on
34 his demurrer and declining to plead further,

It is, therefore, considered by the court that the defendant go hence without day and recover his costs, taxed at the sum of $16.80.

To all of which plaintiff excepts.

Court adjourned to meet June 30th, 1902.

STATE OF NEBRASKA, } ss:
Custer County, }

I, C. T. Orr, clerk of the district court of the twelfth judicial district, held in and for the county of Custer and State of Nebraska, do hereby certify that the above and foregoing is a true, correct and complete copy of the substituted amended petition, the amended answer and the demurrer of the plaintiff to the amended answer, and the ruling of the court thereon, all in the case of Edward Jaster, Sr., plaintiff, *vs.* F. M. Currie, defendant, as thes same appears on the files and of record in my office in said case.

Witness my hand and the seal of said court hereunto attached, this 1st day of July, A. D. 1902, at Broken Bow, Nebr.

C. T. ORR, *Clerk Dist. Court,*
[SEAL.] By GERTRUDE G. ORR, *Deputy.*

Endorsed: 12840. Edward Jaster, Sr., *v.* F. M. Currie. Transcript. Supreme court of Nebraska. Filed Aug. 4, 1902. Lee Herdman, clerk.

And on the same day there was made to issue out of the office of the clerk of said supreme court a certain summons in the words and figures following, to-wit:

35 *Summons in Error.*

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Custer:

You are hereby commanded to notify F. M. Currie that a petition in error has been filed in the supreme court of Nebraska by Edward Jaster, Sr. asking the reversal of a judgment against him rendered on the 7th day of June, 1902, in a certain cause in the district court of Custer county, wherein the plaintiff herein was plaintiff and the

defendant herein was defendant and to appear before the supreme court, at the city of Lincoln, on the 16th day of September, 1902, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 16th day of September, 1902.

Witness my hand and the seal of said court, at the city of Lincoln, this 4th day of August, A. D. 1902.

[SEAL.] LEE HERDMAN, *Clerk.*

And afterward, to-wit, on the 11th day of August, A. D. 1902, said summons heretofore issued out of the office of the clerk of said supreme court was returned and filed therein with service endorsed thereon as follows:

THE STATE OF NEBRASKA, } ss:
Custer County, }

Service of copy waived and I hereby accept due and personal service of this summons August 7th, 1902.

F. M. CURRIE,
Def't in Error,
By C. L. GUTTERSON,
His A'tty.

36 Endorsed: General No. 12840. Supreme court, State of Nebraska. Edward Jaster, Sr. *v.* F. M. Currie. Summons in error. Supreme court of Nebraska. Filed Aug. 11 1902. Lee Herdman, clerk.

And afterward, to-wit, on the 17th day of March, A. D., 1903, there was rendered by said supreme court and entered of record upon the journal thereof a certain order in the words and figures following, to-wit:

EDWARD JASTER, SR., Plaintiff in Error, } No. 12840. Error to the District Court of Custer County.
v.
F. M. CURRIE, Defendant in Error. }

Upon application of the defendant in error, by E. J. Clements his attorney, it is by the court ordered that he have one week in which to serve and file his briefs.

And afterward, to-wit, on the 7th day of April, the following proceedings were had and done in said supreme court, to-wit:

The following causes *were* argued and submitted: O. A. Abbott, appearing for plaintiff in error, E. J. Clements, appearing for defendant in error.

JASTER
v.
CURRIE. } Error to Custer County.

And afterward, to-wit, on the 6th day of May, A. D., 1903, there was rendered by said supreme court and entered of record upon the journal thereof a certain judgment in the words and figures following, to-wit:

EDWARD JASTER, SR., Plaintiff in Error,
37 v.
F. M. CURRIE, Defendant in Error. } No. 12840. Error to the District Court of Custer County. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel, on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is, therefore, considered by the court that said judgment be and the same is hereby affirmed; that the defendant in error have and recover of the plaintiff in error his costs herein, taxed at $—, for which execution is hereby awarded; that said plaintiff in error pay his own costs, taxed at $—, and that a mandate issue accordingly.

And on the same day there was rendered by said supreme court and filed in the office of the clerk thereof a certain opinion in the words and figures following, to-wit:

38 *Opinion. Filed May 6, 1903.*

JASTER
v.
CURRIE. } No. 12840.

1. In an action on a judgment of a sister State it is competent for the defendant to show that he was induced by the fraudulent conduct of the plaintiff to come within the jurisdiction of the court rendering the judgment.
2. Full faith and credit is not denied the judgment of a sister State by permitting the defendant in an action on such judgment to show that jurisdiction of his person was fraudulently obtained.
3. The rule requiring each State to give full faith and credit to the judicial proceedings of every other State will not shield a judgment of a sister State from attacks that might have been made upon it in the State where it was rendered.

4. A party who has been induced by the fraud of his adversary to go into a jurisdiction other than that of his residence for the purpose of being there served with process need not appear specially and move to quash the service. He may entirely ignore the proceeding without waiving his right to defend against the judgment.
5. If a party has been fraudulently brought within the jurisdiction of a court for the purpose of serving process upon him the
39 service is not lawful even though he might, by exercising diligence, have gotten out of the jurisdiction after the fraud ceased to be operative and before the process was served.
6. Where the rights of innocent third parties are not involved it is permissible to show by parol evidence that the contract between the indorser and indorsee of a promissory note was different from that which results by legal implication from a blank indorsement.

40 SULLIVAN, *C. J.*:

This was an action on a judgment recovered by the plaintiff, Edward Jaster, Sr., against the defendant, Frank M. Currie, in the court of common pleas of Trumbull county, Ohio. The answer of the defendant among other things alleges that he was not indebted to the plaintiff; that he did not appear generally in the action; and that he was decoyed into the jurisdiction of the Ohio court for the purpose of being there served with process. A general demurrer to the answer was overruled and judgment on the merits given in favor of the defendant.

The contention of Jaster, based upon Christmas *v.* Russell, 5 Wall. 290, and other decisions of the Supreme Court of the United States, is that fraud in inducing the defendant to come within the jurisdiction of the Ohio court where an unjust judgment was recovered against him, is not available in an action brought upon that judgment in this State. This court is committed to a contrary doctrine. In Eaton *v.* Hastey, 6 Nebr., 419, it was expressly held that fraud is a good defense to an action brought on a judgment of a sister State. The same conclusion was reached in Keeler *v.* Elston, 22 Nebr., 310, and the doctrine was reaffirmed in Snyder *v.* Critchfield, 44 Nebr., 66, although the question was not involved in that case. The plaintiff insists, however, that the doctrine of the foregoing cases is in conflict with section 1, art. 4, of the Federal Constitution, and the act of Congress made in pursuance thereof, which require each State
41 to give full faith and credit to the judgments of every other State. Many authorities may be cited which apparently sustain the plaintiff's position, but upon examination it will be found that they emanate from jurisdictions where the distinction between actions at law and suits in equity is strongly maintained and enforced, and where an equitable defense is not recognized nor allowed in an action at law. In this State the distinction between

actions at law and suits in equity is abolished by statute, and to an action on a legal demand the defendant may interpose any defense he may have, whether the same be legal or equitable. The constitutional provision and act of Congress, above referred to, require nothing more than that the judgment shall be given precisely the same effect in every other State, that it has in the State where it was rendered. Hanley *v.* Donogue, 116 U. S., 1; French *v.* Pease, 10 Kas., 51; Simons *v.* Clark, 56 Ill., 96; McLaren *v.* Kehler, 8 Am. Rep., 592. In other words, in an action on a judgment of a sister State it has all the advantages and none other than it would have were it sought to be enforced in the State where it was rendered. Neither the Constitution of the United States, the laws of Congress nor any rule of commity require the courts of this State to shield a judgment from attacks that might have been successfully made upon it in the State where it was rendered. Wood *v.* Watkinson, 17 Conn., 500, 44 Am. Dec., 562, 16 Am. St. Rep., 782;
42 Taylor *v.* Barron, 30 N. H., 78; 764 Am. Dec., 281; Bank of Chadron *v.* Anderson 48 Pac. Rep. (Wyo.), 197; Warrington *v.* Ball, 90 Fed. Rep., 465.

This being true, when the plaintiff sought to enforce his judgment in this State, the defendant had the same right to look for relief to the courts exercising equity jurisdiction in this State that he would have had to look to a court of equity of the State of Ohio, had the plaintiff sought to enforce it there. Under our system of pleading it was not necessary that he should institute an original action for relief. The Code of Civil Procedure is designed to prevent circuity of action and to prevent multiplicity of suits. Any grounds that he could have urged in an action instituted by him to obtain relief from the judgment are available as a defense to an action brought to enforce such judgment. The following cases, we think, fully sustain this conclusion: Toof *v.* Foley, 87 Ia., 8; Dunlap *v.* Cody, 31 *Id.*, 260; Pilcher *v.* Graham, 18 Ohio (C. R.), 5; Abercombie *v.* Abercrombie, 67 Pac. Rep., 539; Wood *v.* Wood, 78 Ky., 629; Mark *v.* Fore, 51 Mo., 691. In most, if not all, of the cases just cited, the fraud consisted, as it does in this case, in decoying the defendant within the jurisdiction of the court rendering the judgment.

The plaintiff further contends that the answer fails to show a defense to the notes, upon which the judgment is based. We need not stop to enquire whether in order to obtain relief from a
43 judgment obtained by fraud it is necessary to show a defense to the action in which such judgment was rendered. Whether necessary or unnecessary, the defendant has in his answer stated a valid defense to the action brought in the State of Ohio. It is true that such defense involves contradicting the contract which the law implies, over his endorsement of the notes upon which the action was based. But this court is thoroughly committed to the doctrine that that may be done, so long as the rights of innocent third parties are not involved. Whitney *v.* Spearman, 50 Nebr., 617; Holmes

v. Bank, 38 Nebr., 326; True v. Ballard, 45 Nebr., 409; Corbett v. Fetzer, 47 Nebr., 269.

It is said that the question of the jurisdiction of the court of common pleas over the defendant was raised in that court by a motion to quash the service of summons and that the question was adjudged in favor of the plaintiff and can not be again litigated. The answer alleges that at the time the motion to quash was presented and determined defendant did not know that plaintiff had been guilty of any fraudulent conduct, and it appears quite clearly from the petition in this case that the special appearance was made only for the purpose of challenging the validity of the service of the summons on the ground that defendant was in Ohio for the purpose of attending the taking of depositions and therefore exempt from service of judicial process. That objection, if not interposed before judgment would, of course, have been waived.

44 But the objection that jurisdiction was fraudulently obtained was one which, according to the authorities, defendant was under no obligation to present to the Ohio court. He was not obliged to litigate any question in a court whose jurisdiction over him was obtained by deception and trickery. This is the doctrine implied in all the cases holding that fraud in obtaining jurisdiction is a good defense to an action on a judgment of a sister State.

To the suggestion that if the defendant had been diligent he might, after the depositions had been taken, have gotten out of Ohio without being served with summons it is only necessary to say that want of diligence on the part of defendant could not change the quality of plaintiff's conduct nor entitle him to retain any advantage gained by fraud. Townsend v. Smith, 47 Wis., 623.

The judgment is right and is affirmed.

45 Thereupon, on the 18th day of June, A. D., 1903, there issued out of said court a certain mandate.

And afterwards, to-wit, February 10, A. D., 1904, there was filed in the office of the clerk of said supreme court a certain petition for writ of error in the words and figures following, to-wit:

46 In the Supreme Court of the State of Nebraska.

EDWARD JASTER, SR., Plaintiff in Error,
vs.
F. M. CURRIE, Defendant in Error.
} Petition for Writ of Error.

To the Honorable Silas A. Holcomb, chief justice of the supreme court of the State of Nebraska:

Your petitioner, Edward Jaster Sr., plaintiff in error, respectfully represents and shows unto your honor that he is a citizen and resident of the State of Ohio and was a citizen and resident of said State at all the dates and times hereinafter mentioned and that said F. M.

Currie, defendant in error, was during all of said time a citizen and resident of the State of Nebraska.

Your petitioner further represents that on the sixth day of May A. D., 1903 in the above entitled suit and in the supreme court of the State of Nebraska a judgement was rendered against your petitioner and in favor of the said F. M. Currie, defendant in error, which judgment is final and that said court is the highest court and court of final resort in the State of Nebraska in which a decision in said cause could be had or made; a transcript of the record and proceedings in said court is herewith submitted.

Your petitioner further alleges that there was involved in said cause and necessary to its determination the validity, force and effect of a judgement in favor of your petitioner and against the defendant in error rendered by the court of common pleas of the county of Trumbull in the State of Ohio in a suit in said court of Ohio between the same parties upon personal service duly had upon said defendant in said county of Trumbull in the State of Ohio, which said judgement was duly pleaded by your petitioner as the basis of his suit and his cause of action in the State of Nebraska and
47 that the validity, force and effect of said judgement in the State of Nebraska was challenged by the defendant in error by his plea and answer wherein he alleges that service upon him in said Ohio court was unlawfully and fraudulently obtained in said Trumbull county, Ohio which said plea and answer of the defendant in error was upon the demurrer of your petitioner by the said supreme court of the State of Nebraska held to be good and said judgement as against said plea and answer held to be of no force effect and validity in the State of Nebraska in disregard to section one (1) of article four (4) of the Constitution of the United States and the decisions of the Supreme Court of the United States thereunder.

Your petitioner further represents that the decision of the supreme court of Nebraska was against the validity, force and effect of the Ohio judgement and that such decision against said Ohio judgement was necessary to the judgement of the supreme court of Nebraska and that without such decision against the validity, force and effect of the Ohio judgement said judgement against your petitioner could not have been rendered by the supreme court of Nebraska.

Your petitioner further represents that under and by reason of the decision of the supreme court of Nebraska denying that validity, force and effect of the Ohio judgement he has been denied the protection of section one (1) of article four (4) of the Constitution of the United States and is without remedy in the premises except through and by the interposition of the Supreme Court of the United States in his behalf.

Wherefore, your petitioner prays the allowance by your honor of a writ of error to the supreme court of Nebraska to remove the record and proceedings in said suit into the Supreme Court of the United States for its revision thereof and for a citation directed to

the said F. M. Currie for his appearance in the said Supreme Court of the United States to the end that said judgement of said supreme court of Nebraska may be reversed and your petitioner restored to all things he has lost thereby and for his costs about this suit in his behalf expended.

O. A. ABBOTT,
Att'y for Pl'ff in Error.

48 Writ of error and citation in the within case allowed this 10th day of February A. D. 1904.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

49 [Endorsed:] 12840 In supreme court Neb. Edward Jaster Sr. *vs.* F. M. Currie. Petition for writ of error to Supreme Court U. S. Supreme court of Nebraska. Filed Feb. 10 1904. Lee Herdman, clerk. O. A. Abbott att'y for pl'ff in error.

50 And on the same day there was filed in the office of the clerk of said supreme court of Nebraska a writ of error in said cause from the United States Supreme Court.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edward Jaster Sr., plaintiff and F. M. Currie defendant, wherein was drawn in question the force and validity of a judgement rendered in the court of common pleas in the county of Trumbull, in the State of Ohio and the force and validity of such judgement in the State of Nebraska under section one (1) of article four (4) of the Constitution of the United States and the decision was against the force and validity of such judgement in the State of Nebraska a manifest error hath happened to the said Edward Jaster Sr., as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you that if judgement be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court at Washington within

thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error whatever of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of February in the year of our Lord nineteen hundred and four.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk of U. S. Circuit Court for the District of Nebraska.

52 Clerk of the Circuit Court of the United States for the District of Nebraska.

Allowed by

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of Nebraska.

53 [Endorsed:] 12840 In supreme court Neb. Edward Jaster Sr. *vs.* F. M. Currie Writ of error Supreme court of Nebraska. Filed Feb. 10 1904 Lee Herdman clerk. O. A. Abbott att'y for pl'ff in error.

54 And on the 23rd day of February, A. D., 1904, there was filed in the office of the clerk of said supreme court of Nebraska, a citation, directed to F. M. Currie, citing and admonishing him to be and appear at a Supreme Court of the United States within thirty days from February 10th, 1904, with service of same attached thereto.

55 UNITED STATES OF AMERICA, } ss:
State of Nebraska, County of Lancaster, }

J. C. Deweese being by me first duly sworn on his own oath states that he delivered a true copy of the within citation to E. J. Clements in said county on the 22nd day of February in the year of our Lord one thousand nine hundred and four and further saith not—

Subscribed in my presence by the said J. C. Deweese and sworn to before me this 22nd day of February A. D. 1904. Witness my hand and notarial seal the date last above written.

{ Notarial Seal of S. K. Kier, Lancaster County, Nebraska. Commission expires Jan. 14, 1910. }

S. K. KIER,
Notary Public.

56 UNITED STATES OF AMERICA, ss:

To F. M. Currie, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States within 30 days from the date hereof pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska wherein Edward Jaster Sr., was plaintiff in error and you are defendant in error to show cause, if any there be, why the judgement rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Silas A. Holcomb chief justice of the supreme court of the State of Nebraska, this 10th day of February in the year of our Lord nineteen hundred and four.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 12840. In supreme court Neb. Edward Jaster Sr. *vs.* F. M. Currie Citation. Supreme court of Nebraska. Filed Feb. 10 1904 Lee Herdman clerk. Supreme court of Nebraska. Filed Feb. 23 1904 Lee Herdman O. A. Abbott att'y for pl'ff in error.

57 And on the same day, to wit, February 10th, A. D., 1904, there was filed in the office of the clerk of said supreme court a certain assignment of errors in the words and figures following, to-wit:

58 In the Supreme Court of the State of Nebraska.

EDWARD JASTER, SR., Plaintiff in Error,
vs.
F. M. CURRIE, Defendant in Error.
} Assignment of Error and Prayer for Reversal.

Comes now Edward Jaster, Sr., plaintiff in error in the above named court and assigns the following as manifest error upon the face of the record to be corrected in the Supreme Court of the United States to which this cause is to be removed on a writ of error duly allowed for that purpose, to wit:

First.

The court erred in failing and refusing to give full force and effect to the judgement of the court of common pleas of Trumbull county, State of Ohio and in not holding that such judgement was con-

clusive of the present controversy between the parties thereto and that it entitled plaintiff in error to a judgement as prayed in his original petition.

Second.

The court erred in holding that the judgement of the court of common pleas of Trumbull county, State of Ohio was open to attack in this State on the ground that service on the defendant in error in Trumbull county, Ohio was unlawfully or fraudulently procured.

Third.

The court erred in holding that the plea and answer of the defendant in error constituted a defense to plaintiff's action on said judgement.

Fourth.

The court erred in failing to reverse the judgement of the district court of Custer county, Nebraska, overruling the de-
59 murrer of plaintiff in error to the plea and answer of the defendant in error.

Wherefore, plaintiff in error prays that the judgement of the supreme court of Nebraska and the judgement of the district court of Custer county, Nebraska and each of them may be reversed and that he may be restored to all things lost thereby.

O. A. ABBOTT,
Attorney for Plaintiff in Error.

60 [Endorsed:] 12840 In supreme cour- Neb. Edward Jaster Sr. *vs.* F. M. Currie. Assignment of error Supreme court of Nebraska. Filed Feb. 10 1904 Lee Herdman clerk. O. A. Abbott att'y for pl'ff in error.

61 STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, proceedings, opinion of the court and final judgment in a cause in said court, wherein Edward Jaster, Sr., was plaintiff and F. M. Currie was defendant, as fully as the same is of record and on file in my office.

I further certify that the annexed petition for writ of error, writ of error, citation, and assignment of errors, are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error, citation and assignment of errors, with the indorsements thereon.

In testimony whereof, I have hereunto set my hand and caused

to be affixed the seal of said court, at the city of Lincoln, this 25 day of February, A. D., 1904.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk of the Supreme Court of Nebraska.

62 In the Supreme Court of the State of Nebraska.

EDWARD JASTER, SR., Plaintiff in Error,
vs.
F. M. CURRIE, Defendant in Error. } Bond for Costs.

Know all men*t* be these presents, that we, Edward Jaster, Sr., as principal, and —— ——, as surety, are held and firmly bound unto the above named F. M. Currie in the full and just sum of two hundred dollars ($200) to be paid to the said F. M. Currie, his certain attorneys, executors, administrators or assigns to which payment we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Dated this 27th day of February, A. D. 1904.

Whereas, lately, in the above named court and in a suit depending therein between the above named Edward Jaster, Sr., as plaintiff in error and the said F. M. Currie, as defendant in error, judgment was rendered against the said Edward Jaster, Sr., for costs and affirmance of the judgment of the district court of Custer county, Nebraska, and Edward Jaster, Sr., having prayed and obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of said court to reverse the judgment of the aforesaid suit and a citation directed to F. M. Currie, citing and admonishing him to be and appear before the Supreme Court of the United States at the term therefore to be next holden.

Now the condition of the above obligation is such that if the said Edward Jaster, Sr., shall prosecute his said writ to effect
63 and answer all costs if he fai*d* to make his plea good, then the above obligation to be *f*oid, else to be and remain in full force and effect.

EDWARD JASTER, SR.,
By O. A. ABBOTT, *Att'y.*
AMERICAN BONDING COMPANY
OF BALTIMORE,
[SEAL.] By R. R. HORTH, *Vice-Pres'd't.*

Attest: O. A. ABBOTT, JR., *Ass't Sec'y.*

Witnesses:

—— ——.

Approved by me,
SILAS A. HOLCOMB,
Chief Justice, Supreme Court of Nebraska.

Dated this 29th day of February, A. D. 1904.

Endorsed: 12840. Edward Jaster, Sr., *v.* F. M. Currie. Bond for costs. Supreme court of Nebraska. Filed Mar. 12, 1904. Lee Herdman, clerk.

I, Lee Herdman, clerk of the supreme court of the State of Nebraska do hereby certify that the above and foregoing is a true copy of bond for costs in the case of Edward Jaster, Sr., *vs.* F. M. Currie, now on file in my office, together with all endorsements appearing thereon.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk Supreme Court.

Endorsed on cover: File No. 19,264. Nebraska supreme court. Term No. 613. Edward Jaster, Senior, plaintiff in error, *vs.* F. M. Currie. Filed March 9th, 1904. File No. 19,264.

IN SUPREME COURT OF THE UNITED STATES

EDWARD JASTER, Sr.,
Plaintiff in Error,

vs.

F. M. CURRIE,
Defendant in Error.

OCTOBER TERM, 1895.
No. 613.

ERROR TO THE SUPREME COURT OF NEBRASKA.

STATEMENT.

The controversy in this case is over the validity, force and effect of a judgment rendered in the Court of Common Pleas of Trumbull county, Ohio, when sued on in the courts of Nebraska. The plaintiff affirming such validity and the defendant denying the same.

The judgment was rendered against the defendant in error as endorser on three several promissory notes of Two Hundred Dollars ($200) each, made by Amos Perkins and William Perkins to the defendant, F. M. Currie, on January 10, 1893. These notes were alike save date of maturity, and in this form:

"$200.00. Sargent, Nebraska, January 10, 1893.

"On the first day of January, 1894, for value received, I, we, or either of us, promise to pay to the order of F. M. Currie, Two Hundred Dollars ($200), at the office of Frank M. Currie, Sargent, Nebraska, with interest at ten per cent. per annum from date until paid.

"The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note and all defenses on the ground of an extension of the time of its payment that may be given by the holders to them or either of them.

"AMOS PERKINS.
"WILLIAM PERKINS."

[illegible] vs. [illegible].

[illegible] of the notes were endorsed as follows:

"Pay to the order of E. Lauter, Sr., F. M. Currie."

Suit was begun on these notes against the makers [illegible] residents in Custer county, Nebraska, in December, 1898. [illegible] August 5, 1899, a notice was served on the attorney for F. M. Currie that the deposition of the plaintiff would be taken [illegible], in Trumbull county, Ohio, on September 5, 1899, [illegible] accordance with the practice of Nebraska, Code Civil P[illegible] Statutes, Sec. 372.

The defendant on the advice of his counsel attended [illegible] person. The deposition was completed the same day. In [illegible] afternoon of that day the defendant went to the home of [illegible] father who lived near Latimer in Trumbull county, where [illegible] remained until 1:17 a. m. of the 8th day of September.

Suit was begun in the common pleas court of Tru[illegible] ball county on the same notes on the 7th day of Septemb[illegible] 1899, and personal service of summons made on the defend[illegible] that day. On the 6th day of October the defendant, by Gilb[illegible] & Chryst, his attorneys, appeared specially and filed a mot[illegible] to set aside the service. Afterwards leave was given to [illegible] affidavits and the motion finally overruled February 26, 19[illegible] A writ of error was taken from this decision to the circuit co[illegible] where the judgment was affirmed, and on May 9, 1900, in p[illegible] suance of the mandate from the circuit court a judgment [illegible] entered in favor of plaintiff for $961 and costs. This suit [illegible] commenced in Custer county, Nebraska, on that judgment, [illegible] September, 1900.

The proceedings in the common pleas and circuit cou[illegible] of Ohio are set out at length in plaintiff's amended petition.

The defendant in his amended answer admits that [illegible] Trumbull county court of common pleas is a court of record [illegible] general jurisdiction and that the record of the Ohio courts [illegible] set out is correct, but pleads that the judgment was obtai[illegible] by fraud; that the notice to take depositions in Ohio [illegible] served for the purpose of fraudulently enticing and inducing [illegible] defendant to go into the state of Ohio, that he might be s[illegible] there; that he did not know of such fraudulent purpose u[illegible] after he filed his special appearance in said cause and had [illegible] opportunity to present such defense in the Ohio courts.

As a defense to the notes he alleges that he was enga[illegible] in loaning, collecting and re-loaning money for the plain[illegible]

under a parol agreement by the terms whereof he should not become liable as an endorser on any notes taken in his own name; that having made a collection for plaintiff, in lieu of sending him the money he endorsed and sent the notes sued on to plaintiff with a letter informing him of the facts; that these notes were secured by chattel mortgage and were good; that when the first note matured he advised plaintiff to insist on payment or foreclose the mortgage securing the same, which plaintiff neglected to do and by reason of such neglect the mortgaged chattels had been disposed of and could not be reached; that the endorsement was without consideration.

To this amended answer a demurrer was filed, which having been overruled plaintiff elected to stand on his demurrer, and judgment was entered against him June 7, 1902.

The cause was then removed to the supreme court of Nebraska on error, where the judgment of the court below was affirmed and costs taxed to plaintiff. This writ of error is prosecuted to reverse those judgments.

It may be noted in passing that in the petition in error to the supreme court of Nebraska, plaintiff did not in express terms claim the protection of section one (1) of article four (4) of the constitution, nor did he in express terms claim that this judgment was protected under section 905, Revised Statutes, U. S., passed to carry into effect such provision of the constitution. We submit, however, that the ground of our contention clearly appears from the following excerpt from the opinion of the supreme court:

> "The contention of Jaster, based upon Christmas v. Russell, 5 Wall, 290, and other decisions of the Supreme Court of the United States, is that fraud in inducing the defendant to come within the jurisdiction of the Ohio court, where an unjust judgment was recovered against him, is not available in an action on that judgment in this state. This court is committed to a contrary doctrine."

Our contention then was and still is:

FIRST: So long as that judgment stood unimpeached in Ohio, it was unimpeachable in Nebraska.

SECOND: The answer disclosed no fraud on the part of the plaintiff.

THIRD: The answer disclosed no valid defense against either the notes or the judgment.

ARGUMENT

IS A FEDERAL QUESTION INVOLVED?

Whether one state has given full faith and credit to th judgment of another state is always a federal question and th Court has jurisdiction to review such judgment where th question appears from the record.

Huntington v. Attrill, 146 U. S., 657.

The Nebraska courts have held this Ohio judgment voi and refused to enforce it. The Ohio courts in Anderson Anderson, 3 Ohio, 109, held that fraud in procuring a judgmen in a sister state was no defense when that judgment was sue on in Ohio. Will it now surrender its convictions on that su ject because forsooth the Nebraska courts "are committed to contrary doctrine?" Will the fact that this judgment has bee denied full faith and credit in Nebraska prevent its enforcemen in that state should the defendant ever again set foot within i borders or acquire property within the reach of those courts?

Again, should the defendant remove from Nebraska some other state, or to each of the others successively, wh rule will the courts of those states apply to it? If each state which he may go is at liberty to choose its own course in th matter, it may be a good judgment in one-half the states in th Union and a bad judgment in as many more and judicial cha result.

We submit that upon reason and authority this Court ha jurisdiction and that its decision must be final, that this is on of the objects and purposes for which this Court was calle into being.

WAS THE OHIO JUDGMENT GIVEN FULL FAITH AND CREDIT?

It surely was not enforced. The Nebraska court assume the right to review the action of the Ohio court, its manner acquiring jurisdiction and the right to determine whether or no it should be enforced in Nebraska. It assumed to act as thoug under the constitution and statutes in pursuance thereof, eac state had the right to determine for itself what judgments would respect. We submit that so long as the judgment of

sister state cannot be impeached in the state where rendered is unimpeachable in every other state.

Christmas v. Russell, 5 Wall., 290.
Maxwell v. Stuart, 22 Wall., 77.
Anderson v. Anderson, 8 Ohio, 109.
McRae v. Mattoon, 20 Mass., 58.
Hanna v. Read, 102 Ills., 596.
Davis v. Hagler, 40 Kan., 187.
Engstrom v. Sherburne, 157 Mass., 153.

WAS JURISDICTION FRAUDULENTLY ACQUIRED?

The Nebraska court assumes without discussion that "fraud, trickery and deception" were practiced on the defendant to get him within the jurisdiction of the Ohio courts. The answer alleges fraud. Counsel for defendant insists that the demurrer to the answer admits it. We submit the demurrer admits only such facts as are well pleaded and the legitimate conclusions to be drawn therefrom.

The demurrer in this case admits the service of notice on defendant's counsel of the proposed taking of plaintiff's deposition at Vernon, in Trumbull county, Ohio, on September 8th, 1899; the taking of the deposition at the time and place stated in the notice and its completion the same day, and the institution of this suit and service of the summons on the defendant on the 7th day of September, two days after the taking of the deposition.

All the other acts were done by the defendant on his own initiative or on the advice of his own counsel without suggestion on the part of plaintiff. And the fraud alleged is not based on the institution of the suit in Ohio, but is based on the act of inducing him to go there that he might be sued; and the simple ordinary service of notice to take depositions is all the act laid at our doors. If this constitutes "FRAUD, TRICKERY AND DECEPTION," no judgment is safe when under review by the courts of another state.

It cannot be true that attending the taking of depositions in Ohio grants him eternal immunity from service in Ohio. A reasonable time to return is all he can ask.

Smythe v. Bank, 4 Dall., U. S., 329.
Chaffee v. Jones, 19 Pick. Mass., 260.

WAS THE JUDGMENT UNJUST?

The court without discussion assumes that the judgme was an "unjust judgment," but does consider whether or evidence could be received to vary or contradict the contra implied by law on the part of the endorser, and arrives at t conclusion that such evidence is competent—that question co ceded without an admission that it is right or legal—t question then presented, and the question of paramount i portance where a judgment is assailed, is: Do the facts set o disclose such a defense as renders the judgment unjust? W it such an unconscionable judgment as authorizes the interfe ence of a court of equity to set it aside? That must be deter ined from the facts set out in the amended answer, which a briefly these: The defendant while engaged in loaning mon for plaintiff, collecting and re-loaning same under a par agreement that he should not be liable as endorser on a "notes taken in his own name," having made a collection f plaintiff, in lieu of sending him the money so collected, endors and sent plaintiff the notes sued on, which were own by himself, with a letter explaining the transactio that those notes were secured by a chattel mo gage and were good; that when the first note matured advised plaintiff to insist on payment and if not paid to fo close; which plaintiff neglected to do, and by reason of su neglect the security was lost. It discloses a transaction whe the agent was both vendor and purchaser of his own notes behalf of his principal, the plaintiff. A transaction where h personal interest conflicted with his duty as agent for plainti Such transactions are universally condemned by the courts a held voidable as contrary to public policy.

Michand v. Girod, 4 How, 45 U. S., 503.
Davoue v. Fanning, 2 Johns C. H., 252.
Veeder v. McKinley & C., 61 Neb., 893.

Whether defendant would have been liable notwithstan ing the agreement, had it been broad enough to include th transaction, we need not stop to inquire, since the agreeme that he should not be liable as endorser "on notes taken in h own name" clearly does not contemplate that he shall not liable on notes of his own endorsed and sold to plaintiff.

We submit that it was neither inequitable nor unjust to require him to pay those notes, and that the facts set out disclose no defense.

It is respectfully submitted that the judgment of the supreme court of Nebraska and the judgment of the district court of Custer county, Nebraska, and each of them, be reversed and that this cause be remanded for further proceedings.

J. R. WEBSTER and O. A. ABBOTT,
Attorneys for Plaintiff in Error.

No. 208.

IN THE SUPREME COURT

OF THE

UNITED STATES

EDWARD JASTER, &c.,
Plaintiff in Error.

vs.

F. M. CURRIE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

HALLECK F. ROSE and
E. J. CLEMENTS, *Attorneys for Defendant in Error.*

IN THE SUPREME COURT

OF THE

UNITED STATES

EDWARD JASTER, Sr.,
Plaintiff in Error.

vs.

F. M. CURRIE,
Defendant in Error.

OCTOBER TERM, 1903.
NO. 613

ERROR TO THE SUPREME COURT OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This action was brought by plaintiff in error in the District Court of Custer County, Nebraska, on a judgment rendered against the defendant in error by the court of common pleas of Trumbull County, Ohio. The plaintiff filed a general demurrer to the defendant's answer which was overruled. Plaintiff refused to plead further, a judgment was rendered for defendant, and the action was taken to the Supreme Court of Nebraska, by petition in error, where the judgment of the lower court was affirmed. The opinion of said court is reported in 94 N. W. 995.

Briefly stated, the following facts were pleaded in defendant's answer and admitted by plaintiff's general demurrer thereto:

1. That on the 6th day of September, 1899, the date of the

commencement of the Ohio case, the plaintiff was, and, for more than eight years prior to said date, had been, and now is, a bona fide resident of Custer County, Nebraska.

2. That on the 28th day of December, 1898, the plaintiff commenced an action in the district court of Custer county, Nebraska, against the defendant upon the identical notes set up in said Ohio action.

3. That on August 3, 1899, plaintiff caused to be served upon defendant's attorney, in Custer county, Nebraska, a notice in which it was stated that plaintiff would take the deposition of a certain witness at Vernon, in Trumbull county, Ohio, on the 5th day of September, 1899, between the hours of ten o'clock A. M. and six o'clock P. M., to be used in the trial of said Custer county case.

4. That defendant, in pursuance of said notice, and for the express and only purpose of attending the taking of said deposition, went to the state of Ohio on the 4th day of September, 1899, and was in attendance at the time and place mentioned in said notice for taking said deposition.

5. That on the evening of the day set for taking said deposition defendant was taken sick, and on the next day, to-wit, September 6th, plaintiff commenced said action in Trumbull county, Ohio, and caused summons to be served on defendant at 8 o'clock A. M. on the morning of the 7th of September, before defendant could have left said county by the best and most expeditious way of returning to his home in Nebraska.

6. That plaintiff caused said notice to take deposition to be served fraudulently and wilfully, and for the fraudulent purpose of enticing and inducing the defendant to go to the state of Ohio that plaintiff might obtain service upon him in said state.

7. That said notice to take deposition was simply a ruse,

and was given for the purpose of misleading, inducing and enticing the defendant to go to Trumbull county, Ohio, and for the fraudulent purpose of attempting to get service on defendant in said action, and for no other purpose.

8. That defendant believed that said notice to take deposition was given in good faith by plaintiff, and did not discover, nor know, that same was given for the purpose of enticing and inducing him to come to the state of Ohio, that service of summons might be made on him there, until long afterwards.

9. That by reason of defendant's not discovering plaintiff's fraud in inducing and enticing him to come to Ohio, the defendant had no opportunity of presenting same to the Ohio court.

10. That defendant now has, and has always had, a valid defense to the notes sued upon in the Ohio action.

11. That prior to the year 1889, plaintiff had loaned and invested certain moneys in Custer county, Nebraska, and during that year came to Nebraska and entered into an agreement with the defendant, by the terms of which the defendant was to take charge of said investments, collect outstanding notes, and reinvest said funds by loaning same, or by turning over to plaintiff good notes given to defendant, instead of reloaning the money; that, by the terms and conditions of said original contract, it was agreed that, in all cases, when the defendant should turn over, indorse and deliver notes to plaintiff, which defendant had taken in his own name, that defendant should not be personally liable to the plaintiff on his said indorsements, or any of them.

12. That the notes sued upon in the Ohio action were all good notes, well secured by chattel mortgages, given by solvent parties, and were each and all indorsed, turned over

and delivered to plaintiff, under and by virtue of the terms of said agreement, that defendant should not be liable personally on said indorsements.

Whether the agreement that the defendant should not be personally liable to plaintiff on the indorsement of notes taken in defendant's name and turned over to plaintiff, pleaded in the answer, was in writing or verbal is not shown. But as plaintiff failed to move that the answer be made more definite in this respect, the court should, if necessary to sustain the judgment, presume that said contract was in writing. Said agreement was supported by a valid consideration, to-wit, that the defendant should invest plaintiff's funds and transfer notes to him for the purpose of such investment.

ARGUMENT AND CITATION OF AUTHORITIES.

Several questions of general jurisprudence were passed upon by the state court in this case which are in no sense federal questions. In his application to the Chief Justice of the Nebraska supreme court for a writ of error herein, plaintiff alleges but a single reason for the removal of the case to this court, to-wit, that full faith and credit was not given by the courts of Nebraska to the Ohio judgment which constitutes plaintiff's cause of action, as provided in Section 1, Article 4, of the constitution of the United States. In plaintiff's "Assignments of Error," filed in this case, the same question is raised, though variously stated in the several paragraphs thereof. But in their brief filed herein, counsel for plaintiff have discussed, and seek to have this court review, not only the federal question referred to in said application, but also all other questions passed upon by the state supreme court.

On page 3 of their brief, counsel, after quoting from the opinion of the state court, say:

"Our contention then was and still is:

First: So long as that judgment stood unimpeached in Ohio, it was unimpeachable in Nebraska.

Second: The answer disclosed no fraud on the part of the plaintiff.

Third: The answer disclosed no valid defense against either the notes or the judgment."

It is obvious that the second and third propositions above quoted are both questions of general jurisprudence and their determination involves no federal question. But if these questions were open to review here, we are confident that this court would arrive at the same conclusions reached by the state court in regard thereto.

On the question of fraud, plaintiff, by his demurrer, admits that his only purpose in serving notice to take depositions, in the case then pending in Nebraska, was to induce and entice the defendant to come within the jurisdiction of the Ohio court in order that plaintiff might obtain service on him there; that defendant did not know of such fraudulent purpose but believed that the same was bona fide and was thereby induced and enticed into Ohio and service thereby obtained upon him. It requires no argument to show that such purpose and conduct of plaintiff constitute fraud, not only upon the defendant but upon the jurisdiction of the Ohio court. This was the specific holding of the supreme court of Arkansas in Peel vs. January, 35 Ark. 331.

Plaintiff's said third proposition is based upon the contention that the contract implied from the blank indorsement of negotiable paper cannot be contradicted or varied by parol evidence, even between the original parties; and that there was no consideration for the agreement that de-

fendant should not be personally liable on said indorsements. The decision of the state court that the contract, which the law implies from the blank indorsement of a promissory note, may be contradicted, so long as the rights of innocent third parties are not involved, was made on the well-settled, pre-existent rules of general jurisprudence established by a long line of decisions in Nebraska as is shown by the cases cited in said opinion and is, therefore, not subject to review by this court. Bank of Western Tennessee vs. Citizens Bank of Louisiana, 14 Wall. 9. Besides, the record in this case does not show that said contract was not in writing and of equal solemnity with the written indorsements. Plaintiff's contention that there was no consideration to support his agreement that defendant should not be liable on his indorsements is wholly without merit, as such agreement is supported by the same consideration as the balance of the contract, to-wit, the investment of the funds of plaintiff.

But the discussion of these questions is simply academic, for, under well-settled principles and rules, said questions cannot be considered by this court in this case.

I.

A WRIT OF ERROR TO THE HIGHEST COURT OF A STATE BRINGS BEFORE THE SUPREME COURT OF THE UNITED STATES ONLY THE FEDERAL QUESTIONS INVOLVED.

Watson vs. Mercer, 8 Peters, 88.
Barbier vs. Connolly, 113 U. S. 27.
Eustis vs. Bolles, 150 U. S. 361.
Ashley vs. Ryan, 153 U. S. 440.
Jacobs vs. Marks, 182 U. S. 590.

The case of Jacobs vs. Marks, supra, was brought to this court by writ of error to the supreme court of Illinois. Several questions of law were raised, among which was the question of whether the state court had given full faith and credit to a judgment of the state of Michigan. This court held that this was a federal question and the action of the state court in regard to said judgment was reviewed and found correct, but the court declined to consider the non-federal questions involved in the case. We quote from said opinion:

"It is, of course, obvious that none of the errors assigned to the rulings of the trial court, in the admission or rejection of evidence, or its instructions to the jury, nor those assigned to the judgments of the Appellate and Supreme Courts, can be considered by us except as they affect the question of the legal import of the Michigan judgment, as concluding the controversy between the parties in the Illinois courts."

After reviewing the federal question and holding that it had been properly decided by the supreme court, this court said:

"These views dispose of the only question which our jurisdiction enables us to review.

"Finding, as we do, that the courts of Illinois gave all that faith and credit to the judgment and judicial proceedings in the Michigan court to which they were entitled under the Constitution of the United States, the other errors assigned we cannot consider, and the judgment of the Supreme Court of Illinois is affirmed."

It is therefore clear that the only question to be reviewed or considered by this court in this case is "did the state court, by permitting the defendant to plead fraud as a defense to plaintiff's action on the Ohio judgment, fail to give

full faith and credit to said judgment?"

The questions as to whether the facts pleaded constitute fraud and as to the right to contradict the contract implied from a blank indorsement of a note, and as to the consideration of the agreement pleaded, are in no sense federal questions. They were, therefore, conclusively settled by the state supreme court and cannot be reviewed here.

Counsel state their contention in relation to the only federal question raised, to-wit, the right to plead fraud as a defense to the Ohio judgment as follows:

"So long as that judgment stood unimpeached in Ohio, it was unimpeachable in Nebraska."

We take issue with counsel on this proposition and insist that the test is not "has the judgment been impeached for fraud in Ohio?" but rather, "would the courts of Ohio permit it to be impeached for fraud in an action brought therein to enforce it?"

A correct statement of the law in regard to the question under consideration is as follows:

II.

SECTION 1, ARTICLE 4, OF THE FEDERAL CONSTITUTION REQUIRES NOTHING MORE THAN THAT THE JUDGMENT OF A SISTER STATE BE GIVEN THE SAME EFFECT THAT IT HAS IN THE STATE WHERE IT WAS PRONOUNCED; AND WHATEVER PLEAS WOULD BE GOOD IN A SUIT THEREON IN SUCH STATE CAN BE PLEADED IN ANY OTHER COURTS IN THE UNITED STATES.

Act of May 26, 1790, vol. 1, p. 115.
Mills vs. Duryee, 7 Cranch., 481.

Hampton vs. McConnell, 3 Wheaton, 235.

In Hampton vs. McConnell, supra, Marshall, C. J., referring to Mills vs. Duryee, and speaking for the court, said:

"The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

And this has been the settled rule of this court ever since.

This leads us to inquire whether the plea of fraud in obtaining the Ohio judgment in question would have been permitted if the action to enforce said judgment had been brought in the courts of that state. Counsel contend that it could not and cite Anderson vs. Anderson, 8 Ohio, 109, as sustaining their contention. The judgment sued upon in the Anderson case was obtained in Virginia and the decision therein is not, therefore, authority upon whether a plea of fraud would be allowed in an action in the Ohio courts upon a domestic judgment. Besides, said case was decided in 1837, before the adoption of the Ohio Code, materially changing the organization and jurisdiction of courts and method of procedure, and it has ceased to be an authority in Ohio even upon the question therein decided, as we shall hereafter show.

Before the adoption of the Ohio Code, a party against whom a judgment had been obtained by fraud had the right to maintain an original action in equity to set aside such fraudulent judgment. Lockwood vs. Mitchell, 19 Ohio, 448.

The Ohio Code of Civil Procedure enacted in 1853, abolished the distinction between actions at law and suits in

equity. We quote therefrom:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place, there will be, hereafter, but one form of action, which shall be called a civil action. 2 S. & C. Stat. 941."

This section is identically the same as section 3 of the Nebraska Code.

The case of Conway vs. Duncan, 28 O. S. 102, is quite in point on the question under consideration. In that case certain heirs obtained judgments against the estate of their ancestor. Duncan, the administrator, thereafter commenced an action in the court of common pleas alleging the recovery of the judgments; that there was no personal property with which to pay the same; and praying for an order to sell land of said estate to satisfy said judgments. All heirs were made parties, and those who had not obtained said judgments filed an answer and cross-bill alleging fraud in obtaining the same as a defense thereto. This, the trial court held, could not be done. But the supreme court held otherwise and reversed and remanded the case. We quote from the court's opinion, pages 105 and 106:

"If it be true that these judgments, so entered upon the awards of the arbitrators, can not be impeached for fraud, and if they are conclusive evidence of the indebtedness of the estate, then the district court was right, and its judgment must be affirmed.

"That a judgment can be impeached for fraud, we suppose to be a settled question. Lockwood v. Mitchell, 19 Ohio, 448. As is said in Swihart v. Shaum, 24 Ohio St. 432, the conclusiveness of the judgment depends upon the absence of fraud or collusion; and it is competent for the party injured to resort to a court of chancery for relief against such fraud or collusion. These parties, therefore, Walter and Catherine

Conway, might have filed an original bill in chancery, and, by injunction, restrained the administrator from proceeding to sell the land, on the ground that the alleged debts and judgments upon them were fraudulent, and were obtained without the fault or negligence of the parties complainant. What would be good ground for such a bill in equity is good ground for a civil action under the code. Long v. Mulford, 17 Ohio St. 484; Coates v. Chillicothe Bank, 23 Ohio St. 415.

"In Bank of Wooster v. Stevens it is held that a judgment may be set aside upon cross-bill in a proceeding to enforce it.

"We suppose, therefore, that in an action under the code to enforce a judgment, a cross-petition may be filed, and the judgment attacked for fraud, in the same way that it might be by an original proceeding for that purpose.

"The conclusiveness of judgments in general applies to those who are parties and privies to it, and it is claimed that the Conways were neither, so far as regards the proceedings before the arbitrators and the judgments thereon. Whether they were or not, those judgments can be impeached for fraud, under proper circumstances, in the one case as well as the other.

"There may perhaps be the difference that if the party was cognizant of the fraud, and failed to set it up in trial, he may be precluded from so doing after judgment, while one not a party or privy could have had no opportunity of making such defense."

Kingsborough vs. Towsley, 56 O. S. 540; 47 N. E. 544, was an action brought in the court of common pleas of Cuyahoga county, Ohio, on a judgment obtained before a justice of the peace of said county. The transcript of said judgment showed that summons was served on defendant by leaving a copy at his usual place of residence. The defendant sought to impeach this judgment by pleading in his answer that the place where the summons was left was not the residence of defendant. No defense to the original cause of action was

pleaded in said answer. Plaintiff contended that the judgment could not be impeached in said action; that the Code provides a method of direct attack upon judgments by proceedings thereunder to have them vacated or modified, of which the defendant should have availed himself, and by which he is required to tender a good defense to the action before a vacation of the judgment could be obtained. The lower court sustained this contention and rendered a judgment for the plaintiff, but the supreme court held that the defense was a proper one and that it was not necessary to plead or tender a defense to the original action. After referring to the statutory provisions for an attack upon judgments, the court said:

"The equitable remedy was not taken away by those statutory provisions, authorizing an application to the court in which the judgment was rendered to vacate or modify the judgment; nor was it abrogated by any provision of the Code. And as the ultimate legal and equitable rights of the parties concerning the subject-matter in litigation may now be finally determined in the civil action of the Code, which has taken the place of both the former action at law and suit in equity, there is no reason why, in an action on a judgment, the defendant may not plead, by way of defense, any matter which would have been available as a ground of relief in equity against the judgment. The Code authorizes a defendant to plead the equitable, as well as the legal, defenses he may have to an action; and whatever is sufficient in equity to defeat a judgment or its enforcement is a valid equitable defense to an action brought upon it."

In Greene vs. Woodland Ave., etc., Co., 62 O. S. 67; 56 N. E. 646, the court thus states the law:

"When the validity of a judgment is attacked, and an effort made to have it set aside and vacated, or the lien thereof removed, it is proper to compel the plaintiff to show, not only

that the judgment is invalid, but that there is a good defense to the action in which the judgment was obtained; but, when the holder of the judgment attempts to enforce it in a legal proceeding in which he can succeed only by showing a valid judgment, the invalidity of the judgment may be shown as a defense, without going further, and assuming the additional burden of showing that there is a good defense to the action."

The doctrine announced in the foregoing cases is now applied by the courts of Ohio to an action brought in that state on the judgment of a sister state when it is alleged that jurisdiction over defendant was obtained through fraud, as is shown by the recent case of Pilcher vs. Graham, 18 Ohio C. R. 5. This was an action at law brought in the court of common pleas of Stark county, Ohio, on a judgment of the circuit court of Cook county, Illinois. Defendant pleaded that he was a resident of Ohio and was induced to go to Cook county, Illinois, by a letter from plaintiff, stating that his presence was necessary to close up some business, which plaintiff and defendant were jointly interested in, and that while defendant was in Cook county for that purpose service was made on him. The first and third subdivisions of the syllabus of said case are as follows:

"Enticing party into foreign jurisdiction to obtain service of process—

"(1) When a defendant residing in one state is induced to come within the jurisdiction of a court of another state, by a trick or false statement of the plaintiff for the purpose of serving him with summons in an action in that court, the service is void, and the court will not thereby obtain jurisdiction over the person of such defendant.

"Same—Attacking judgment obtained in foreign court for service of process fraudulently obtained—

"(3) In an action on a personal judgment rendered by a court in another state, it is competent to plead and prove in

defense that the defendant was decoyed into the jurisdiction of the court by fraud and false representation by the plaintiff, who took advantage of his presence to serve him with process; and such a defense is not within the rule which forbids the collateral impeachment of judgments, but is in the nature of a direct attack upon the judgment."

From the foregoing cases it is obvious that if the plaintiff in the case at bar had brought his action on the Ohio judgment in question in a court of that state it would have been competent and proper for defendant to plead fraud in obtaining the same as a defense to said action. It follows that the Nebraska court, in permitting such defense, gave to said judgment the same credit and effect that it has in the state where it was pronounced.

III.

IN CODE STATES, WHERE LAW AND EQUITY ARE ADMINISTERED BY THE SAME TRIBUNALS, AND THE DISPOSITION OF THE ENTIRE CONTROVERSY BETWEEN PARTIES IN ONE ACTION IS INTENDED TO BE ENCOURAGED, SUCH FRAUD AS WOULD ENTITLE THE PARTY TO RELIEF FROM A JUDGMENT UPON APPLICATION TO CHANCERY CONSTITUTES A GOOD DEFENSE TO AN ACTION ON SUCH JUDGMENT.

1 E. of P. & P., 837.
2 Freeman on Judgments, 435.
Dobson vs. Pierce, 12 N. Y. 156.
Mandeville vs. Reynolds, 68 N. Y. 544.
White vs. Reid, 24 N. Y. Sup. 290.
Eaton vs. Hasty, 6 Neb. 419.
Keeler vs. Elston, 22 Neb. 310.
Snyder vs. Critchfield, 44 Neb. 69.

Fletcher vs. Rapp, 1 S. & M. Ch. (Miss.) 374.
Holt vs. Alloway, 2 Blackf. (Ind.) 108.
Duringer vs. Moschino, 93 Ind. 495.
Davis vs. Smith, 5 Ga. 274.
Wood vs. Wood, 78 Ky., 628.
Dunlap vs. Cody, 31 Ia., 260.
Pilcher vs. Graham, 18 Ohio, C. R., 5.
Ward vs. Quinlan, 57 Mo., 425.
Gray vs. Richmond & Co., 167 N. Y., 348.
Bank vs. Anderson, (Wyo.), 48 Pac., 197.
Toof vs. Foley, 54 N. W., 59.
Abercrombie vs. Abercrombie, (Kan.), 67 Pac., 539.

The second subdivision of the syllabus in Fletcher vs. Rapp, supra, is as follows:

"Where the plaintiff in a judgment rendered in a sister state comes here to enforce it, it is entirely competent for the defendant to show that the judgment was obtained by fraud."

The third subdivision of the syllabus in Holt vs. Alloway, supra, is as follows:

"In an action on the judgment of a court in another state the defendant may plead that the judgment was obtained by fraud, or that the court had no jurisdiction of the person or of the subject matter."

The following is the syllabus in White vs. Reid, supra:

"In an action in New York on a judgment obtained in Massachusetts defendant can show that he had a valid defense which he set up in the original suit, and that the judgment was obtained by the fraud of plaintiff who induced him to abandon the further defense on assurance that he would discontinue the action."

Dunlap vs. Cody, 31 Ia., 260, was an action brought in Iowa on a judgment obtained in Illinois. Defendant, who was a carpenter and a resident of Iowa, denied any indebtedness and pleaded that he was induced to go into Illinois by plaintiff and his attorneys on the representation that an

elevator was to be built there and he could procure employment thereon; that such statements were made for the purpose of inducing him to go into Illinois so that service of summons could be made on him there in said case. The court held that such judgment was obtained by fraud and that the same was a good defense to the action at law on the judgment. The first three subdivisions of the syllabus in said case are as follows:

"1. Jurisdiction: Fraud in Obtaining: Foreign Judgment. If a person, residing in one jurisdiction, be induced, under false pretenses or representations, to come into another, for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained.

"2. Defense: Judgment. Such fraud in obtaining jurisdiction of the person of defendant will vitiate the judgment.

"3. In a case of this kind it is not incumbent on the defendant to appear before the jurisdiction where the action was commenced and set up the facts showing the fraud; but he may, having failed to appear in the original action, plead them in a subsequent action on the judgment, commenced in the jurisdiction where he resides."

Toof vs. Foley, 87 Ia., 8, decided by the same court in 1893, was an action at law on a judgment obtained in Tennessee. The defense pleaded was that defendant, a resident of Iowa, was induced to go to Tennessee by a letter from plaintiff stating that he was ready to settle certain differences existing between him and defendant; that said letter was written for the purpose of getting defendant into Tennessee so that service might be made on him there. This was held to be a good defense. The following is a copy of the first subdivision of the syllabus in said action:

"Where a person residing in one state is induced by a party in interest, by fraud or false pretense, to come into

another, for the purpose of serving him with a summons, the jurisdiction is obtained by fraud, and the judgment is void."

In Wood vs. Wood, 78 Ky., 624, the defendant, who was a teamster and a resident of Kentucky, was induced to go into Tennessee by the representation of plaintiff that he could make a profit by hauling there; that said representation of plaintiff, although true, was made for the concealed purpose of getting service of process on defendant in Kentucky. A judgment obtained on such service was held to be fraudulent. The third subdivision of the syllabus in said case is as follows:

"Service of process upon a defendant who has been brought within the reach of the process by the fraudulent representations of the plaintiff confers upon the court no jurisdiction to render judgment, and any representation, whether true or false, is fraudulent, if made with a fraudulent design."

The case of Abercrombie vs. Abercrombie, 67 Pac., 539, decided by the supreme court of Kansas, in January, 1902, was an action at law brought on a judgment obtained in Colorado. The plaintiff and defendant were formerly husband and wife, but had parted. The husband resided in Kansas and the wife in Colorado, where she brought suit for a divorce, alimony and custody of their children. During the pendency of this action in Colorado, she, also, commenced an action in Mitchell county, Kansas, for alimony, and personal service was made on defendant. Subsequently an agreement for a compromise was entered into, by which the husband was to pay a certain amount as alimony. The attorneys for the wife told the husband they could not make any definite agreement as to the custody of the children, but that their client would not object to a decree being rendered

by the court of Colorado, giving the two boys into the custody of their father. They also stated to the husband that it was necessary for him to appear in the Colorado case and prove his fitness to take said children, which he did. Shortly after such appearance, the attorneys for the wife notified the husband's attorney that she repudiated the agreement for settlement and refused to be bound thereby, and that on a certain day they would ask that the Colorado case be set for trial. The case in Mitchell county, Kansas, was dismissed. The husband did not appear further in the Colorado case, and a decree was rendered in favor of the plaintiff for a divorce, custody of the children, and a personal judgment rendered against defendant for a large amount of alimony. An action at law was then brought on this judgment in Kansas. The defendant pleaded the foregoing facts in his answer, and the court held that the same was a good defense. We quote from the opinion in said case:

"The jurisdiction of the Colorado court over the defendant having been obtained fraudulently by the plaintiff, it would be an anomaly in the law for this court to assist her in reaping the fruits of her fraudulent conduct. It has long been a rule of this court that, where jurisdiction of a defendant has been obtained by fraud or wrong, he may appear in the action, showing such fraud, and the court will always grant relief. If this is true, can there be any well-defined distinction between permitting him to appear in the original action to show the fraud, and in allowing him to set up such fraud in an action brought upon a judgment rendered in a case where jurisdiction of the defendant was obtained by fraud? Can a valid lawful act be accomplished by an unlawful means? * * *

"The fact that the judgment sued on in this case is the judgment of a sister state can make no difference. It is only when jurisdiction is admitted that full faith and credit

should be given to the judgments of a sister state. That the judgment of a sister state may be attacked collaterally on the ground that jurisdiction was obtained fraudulently is supported by many authorities. In Wood vs. Wood, 78 Ky., 624, 627,—an action upon a judgment in another state, where jurisdiction had been obtained fraudulently,—the court said: 'The judgment, having been rendered by an inferior court, presumably without general jurisdiction, will be treated as a foreign judgment. * * * But whether it be treated as a foreign judgment, or as a judgment of a court of general jurisdiction rendered in a sister state, and therefore coming within the constitutional provision and the act of congress in regard to the faith and credit to be given such judgments, is immaterial, as it is now held both by the state and federal courts that judgments of either character may be collaterally attacked for want of jurisdiction of the subject matter or of the person, regardless of recitals in the judgment or record. * * * The only serious question that has arisen of late years upon this matter is as to whether the judgment could be collaterally inquired into, as to the jurisdiction of the person, when it recites on its face that there was service of process or personal appearance. But now even that question is practically at rest.' In Dunlap vs. Cody, 31 Iowa, 261, 262, 7 Am. Rep., 129, the chief justice says: 'Do the means used to obtain jurisdiction of the person of defendant in the courts of Illinois amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists *in suggestio falsi* or the *suppressio veri*. Both exist here. * * * An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction * * * such purpose should * * * be disgraced. Does the fact that the jurisdiction of the person of the defendant was obtained by fraud constitute a defense to an action upon this judgment? It is the recognized law of this state that, when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defense to an

action thereon. Rogers vs. Gwinn, 21 Iowa, 59, and cases cited. If, then, fraud may be shown to defeat a recovery upon a foreign judgment, when the jurisdiction is undisputed, why should not fraud in obtaining the jurisdiction be followed by like consequences? * * * *Ex parte Wilson*, 1 Atk., 152. Referring to these authorities, Shaw, C. J., says: "These cases, therefore, seem to establish the general principle that a valid and lawful act can not be accomplished by any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights." In Duringer vs. Moschino, 93 Ind., 495, subdivision 1 of the syllabus reads: "Where, by fraud, one induces another to go to another state in order to have service of process upon him, the latter can safely ignore the proceedings, and successfully resist a suit upon any judgment thus obtained."'

"It follows, therefore, that the judgment of the court below is correct, and must be affirmed. All the justices concurring."

That the authorities above cited fully support the proposition stated in the heading of this subdivision of this brief, and are in harmony with the holding of the supreme court of Nebraska in the case at bar, can not be controverted. But counsel have attacked such proposition as unsound and insist that it is in conflict with the rule established by this court in Christmas vs. Russell, 5 Wall., 290, and approved in Maxwell vs. Stewart, 22 Wall., 77.

IV.

THE RULE IN CHRISTMAS VS. RUSSELL DISTINGUISHED.

This case was decided in 1866, and the Maxwell case in 1874, while nearly all of the opinions in the cases above cited

were written since said last named date. Keeler vs. Elston, 22 Neb., 310, was decided in 1887. Christmas vs. Russell was cited in the brief of the plaintiff in error in that case,—*as it was also in several of the other cases* above cited,—and the court was urged to adopt the rule therein laid down, but refused to do so. Counsel for plaintiff contend that the rule in the Russell case is a construction of Section 1, Article 4, of the federal constitution of the Supreme Court of the United States, which should govern the state courts. This leads us to inquire why said courts, with said rule and case before them, rejected the same and refused to be bound thereby, and laid down a different rule. Counsel seem to think that it was simply a wilful disregard by said courts of a precedent, by which they should have been bound. We can not accede to this theory, but feel sure that a careful examination of the matter will convince both court and counsel that there is a good and sufficient reason for the decision in said cases, based upon the difference in the organization and jurisdiction of the United States courts and those of states which have adopted the code system. In the former, the distinction between actions at law and suits in equity is strictly maintained and enforced. The rules of pleading and practice therein are radically different from that of the codes. In the federal courts, as in state courts similarly organized, an equitable defense is not recognized nor allowed in an action at law, but the defendant is compelled to seek redress by a separate suit in equity. On the other hand, in Ohio and Nebraska, and in many other states where the distinction between actions at law and suits in equity has been abolished and but a single form of action is recognized, the whole controversy between the parties may be settled in one suit without regard to whether the action or defense is such as

has heretofore been deemed legal or equitable.

In 1 E. of P. & P., 837, the matter is stated as follows:

"EQUITABLE DEFENSES.—The Codes having abolished the distinctions between actions at law and suits in equity, and between the forms of all such actions, as theretofore existing, an equitable defense to a civil action is now as available as a legal defense. The question now is, ought the plaintiff to recover, and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance. But matter constituting an equitable defense is new matter, and must be pleaded."

Freeman, in his work on judgments, vol. 2, sec. 435, says:

"Defenses may be interposed in an action upon a judgment, seeking to avoid it on the ground that the defendant did not have an opportunity to present his defense in the former action, or was not properly brought before the court so that it had any right to enter judgment against him. The admissibility of defense of this character may depend on whether, under the practice sanctioned by the code or other statute of the state in which the question arises, equitable defenses may be interposed to actions at law. * * * Where, as under the code, law and equity are administered by the same tribunals, and the disposition of the entire controversy between parties in one action is intended to be encouraged, such fraud as would entitle a party to relief from a judgment upon application to chancery constitutes a good defense to an action on such judgment; and this is true in Texas, though the judgment is based upon a just demand. Hence, if jurisdiction of the defendant is obtained by false pretensions and misrepresentations, whereby he was induced to go into the state, where process was served upon him, he may successfully defend an action on the judgment founded upon such service, though in some of the states the defense will not be received as sufficient, unless some excuse is offered for not moving, in the original action, to set aside the service of process."

That the judgment of a sister state was procured by fraud is an equitable defense and can be pleaded only in those jurisdictions where the distinction between actions at law and suits in equity has been done away with. This is clearly shown by an able opinion of the New York court of appeals in Dobson vs. Pearce, 12 N. Y., 156; 62 A. D., 154, from which we quote the following:

"Under our present judiciary system the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and the defendant may set forth by answer as many defenses as he may have, whether they be such as have been heretofore denominated legal or equitable, or both: Code, secs. 69, 150. The code also authorizes affirmative relief to be given to a defendant in an action by the judgment: Sec. 274. The intent of the legislature is very clear that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent. Whether, therefore, fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law or not, it may now be set up as an equitable defense to defeat a recovery upon it. Under the head of equitable defenses are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. The facts alleged by way of defense in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are therefore proper matters of defense; and there was no necessity or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is observed, and justice is administered under the head of common-law and chancery juris-

diction by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that state was proper, if not necessary."

In Mandeville vs. Reynolds, 68 N. Y., 544, this question was again passed upon, the Dobson case cited with approval, and the rule therein announced adhered to. In its opinion the court said:

"Before the system brought in by our Code of Procedure, it was a general rule that a judgment, and any other judicial record was final and conclusive between parties and privies thereto. Even then however it was said that whenever an act was done *fraudum legis*, it could not be the basis of a suit in the courts of the country whose laws were attempted to be infringed. * * *

"But the Code of Procedure has by its enactments taken away most if not all of the reasons of the rule which forbade the impeachment of a judgment collaterally. Now in an action at law, matter which was formerly of equitable cognizance solely, may be set up and given in evidence. * * *

"The court acts upon the matters involved in the action, now in a double capacity, as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment but as a direct assault, which by the changing nature of the issues in the progress of the suit and trial, has become the main question in the case and legitimately before it for trial. It would be quite an abnegation of the conjoint power and jurisdiction of the court, to proceed in the case as long as the issues were of legal cognizance, and as soon as they became of equitable cognizance, to turn the party over to another action in perchance the same court before the same judge, to have in another trial that matter proved and decided against the validity of the judgment, which as the pow-

ers of the court are now in constant reciprocal activity, may as well be determined in one trial by the same tribunal. It is not merely that the same judges possess in equal degrees, powers at law and powers in equity. It is that the distinction between actions at law and suits in equity and the forms of such actions are abolished; and that there is in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs. Code, 669. * * * The intent of the Code is clear, that all controversies respecting the matter involved in litigation shall be determined in one action. Whether fraud or imposition, in the entry of a judicial matter of record, could, before that enactment, have been set up against it, collaterally at law or not, it may now be alleged against as an equitable defense to defeat a recovery upon it. Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152. Under the head of equitable defenses are included all matters which would have before authorized an application to a court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar. * * *

"I think it clear that in many cases the plaintiff may prove in the same action, in opposition to matter set up and proved by the defendant therein, that which before the Code he would have been obliged to have availed himself of by a suit in equity."

In Ward vs. Quinlan, 57 Mo., 425, supra, the supreme court of Missouri held that the rule stated in Christmas vs. Russell is not applicable in a state where equitable defenses to an action at law are permitted. We quote from the opinion in said case:

"In Christmas vs. Russell (5 Wall., 290), the court held that a plea of fraud in obtaining a judgment was bad in an action on the judgment. But that court, in the same case, held that a direct suit in chancery might be maintained to enjoin such judgment in the state where it was rendered. Our practice act allows equitable as well as legal defenses to be

set up in actions at law, and our citizens ought not to be driven to foreign courts to seek remedies against judgments procured by fraud. When sued here upon such judgments, they may set up this equitable defense as a complete bar. (See Marx vs. Fore, 51 Mo., 691)."

This is also the rule of the Ohio courts as is shown by the case of Pilcher vs. Graham heretofore cited and quoted from on page 19 of this brief.

SUMMARY.

The following propositions, we think, are fully established by reason and authority:

1. In a case on error from the supreme court of a state, this court will consider only the federal questions involved.

2. Whether the contract implied by law from the blank indorsement of a note may be contradicted, and whether fraud was sufficiently pleaded in defendant's answer, are both non-federal questions and were conclusively disposed of by the decision of the state court.

3. The only federal question in the case at bar is whether the state court gave full faith and credit to the Ohio judgment in question.

4. Section 1, Article 4, of the Constitution of the United States requires only that a judgment of a sister state be given the same faith and credit which it has where rendered and any defense which may be pleaded in an action thereon in the state where it was pronounced may be pleaded in the courts of any other state.

5. In Ohio, Nebraska, and the other states which have adopted the reform code, abolishing the distinction between actions at law and suits in equity, fraud in procuring a judgment may properly be pleaded as a defense to an action

thereon in the state where pronounced or in a sister state.

6. The rule laid down in Christmas vs. Russell applies only to actions in those jurisdictions where the distinction between actions at law and suits in equity is maintained and, therefore, has no application to the case at bar.

7. In this case the Nebraska court gave the same faith and credit to the Ohio judgment that the courts of Ohio would have done if this action had been commenced therein and, therefore, all that is required by Section 1, Article 4, of the Constitution.

8. The decision of the Nebraska supreme court in this case is right and should be affirmed.

All of which is respectfully submitted.

HALLECK F. ROSE AND
E. J. CLEMENTS,
Attorneys for Defendant in Error.

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MAY 25 1905
SUPREME COURT U. S.

Supreme Court of the United States

No. 205—October Term, 1904.

EDWARD JASTER, Sr., Plaintiff in Error,
vs.
F. M. CURRIE, Defendant in Error.

PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now F. M. Currie, the defendant in error herein, and petitions this honorable court for a rehearing of the above entitled cause for the following reasons and grounds, towit:

1. The point upon which the case was decided was not fully presented by the briefs of the parties.

It was contended in defendant's brief that the only federal question involved in the case is "can fraud in procuring the judgment of a sister state be pleaded as a defense to an action brought thereon?; that the question of whether the facts pleaded in the defendant's answer constituted fraud, is a question of general law and the decision of the state court thereon is conclusive. Relying on the well-settled rule of this court that only the federal question involved will be reviewed in a case on error to a state court, the question of whether the acts of plaintiff pleaded in the answer and admitted by the demurrer were sufficient to constitute fraud, was simply referred to as not requiring argument, and the brief was devoted to the questions of whether admitted fraud was a proper defense to the action and whether the decision in Christmas v. Russel, 5 Wallace, 290, was applicable. This court, in its opinion, decided, or assumed, that defendant's position on the questions last above referred to, is correct, but reversed the case upon a point but slightly considered in the brief of either party.

2. The court erred in holding that there was no misrepresentation, express or implied, by plaintiff, and, therefore no fraud pleaded.

By service of notice to take deposition, the plaintiff clearly

made the following implied representations, towit: That the purpose and object of serving said notice were (a) to enable plaintiff to take the testimony of a witness to be used in evidence in the suit pending; and (b) to give defendant an opportunity to cross-examine said witness. These implied representations were as strong and positive as if made in express words included in the notice. Defendant had a right to rely and act on them. The taking of a deposition is a part of the proceedings in the trial of a case and the defendant had the right to be present and cross-examine the witness. It is admitted by the demurrer that the defendant did rely and act on said representations and went to Ohio for the sole and only purpose of being present at the taking of said deposition.

The following allegations in the answer,

"That said notice to take said depositions of the said Edward Jaster, Sr., was simply a ruse and was given for the purpose of misleading and enducing and enticing this defendant to go to the said county of Trumbull and within the jurisdiction of the court of common pleas of Trumbull county, Ohio, for the fraudulent purpose of attempting to get service in said state of Ohio upon this defendant and for no other purpose" (record P. 19), which are admitted by the demurrer, show conclusively that the above implied representations were wilfully false. It is clear that if plaintiff's only purpose or reason in serving said notice was to entice defendant into Ohio to procure service of summons on him, as admitted, his object could not have been to enable plaintiff to take testimony to use as evidence, or to give the defendant an opportunity to cross-examine the witness.

This identical question was decided by the supreme court of Missouri in Peel v. Jnanury, 35 Ark. 331, in an action on a judgment obtained in Missouri. The plaintiff in that case first commenced an action in Arkansas and served notice on the defendant that a deposition would be taken in Missouri. Defendant went to Missouri in response to said notice to be present and cross-examine the witness. Plaintiff then begun a suit on the same cause of action in Missouri, served summons on defendant and dismissed the case in Arkansas. Defendant failed to appear and judgment was obtained against him by default. Afterwards an action was brought on said judgment in Arkansas. The defendant pleaded the foregoing facts in his answer, and the court held they constituted fraud. The following is an excerpt from the opinion in said case.

"Taking the allegations of the answer to be true, as admitted by demurrer, the personal presence of appellant within the jurisdiction of the circuit court of St. Louis, and the service of process on him there, were obtained by a fraudulent contrivance of appellees.

"True, he went there voluntarily, but if induced to go there by a false notice—a notice intended to bring him there for the purpose of serving him with process, and not designed in good faith to afford him an opportunity to cross-examine witnesses, it was a fraud upon the jurisdiction of the St. Louis circuit court."

The fact that the service of notice to take deposition would have been lawful if done for the object and purpose impliedly represented by the plaintiff, or the fact that the defendant went to Ohio voluntarily, should not excuse the deceit of plaintiff by which his unlawful purpose was accomplished. Such has been the universal holding of the state courts where such question has arisen.

In each of the following cases, towit: Dunlap v. Cody, 31 Ia. 260; Toof v. Foley, 87 Ia. 8; Wood v. Wood, 78 Ky. 628; Pilcher v. Graham, 18 O. C. R. 5; Abercrombie v. Abercrombie, 67 Pac. 539, pages 14 to 20, cited and quoted in defendant's brief filed herein, the plaintiff was guilty of acts which were perfectly lawful had it not been for the concealed object and purpose with which they were done and by which defendant was induced to voluntarily go into another state where service of process was made upon him. But the court held, in every one of said cases, that such acts constituted fraud which would avoid the judgment obtained on such service.

3. The immediate and expected effect of the service of said notice was to obtain an unlawful advantage over defendant to his damage, and the court erred in holding otherwise.

Ordinary prudence and regard for defendant's interest demanded that he be present at the taking of testimony which might materially affect the result of his case, and see that the witness was properly cross-examined. Plaintiff understood and recognized this and expected that defendant would exercise such ordinary prudence and come to Ohio in response to said notice, all of which is clearly shown by his admission that his only purpose and reason for serving said notice was to induce

defendant to come there, so that plaintiff might get service on him.

The right of defendant to have a case brought against him tried in the county and state where he lives is a legal and valuable one. First, because he is more apt to obtain justice where his character and reputation are known; and, second, because the inconvenience and expense to him of litigating the case at a distance of 1000 miles from his home, would be greatly enhanced. The plaintiff in this case knew this and undertook to deprive the defendant of such valuable legal right by his representations which he admits were false. To say that the law sanctions or permits a plaintiff to accomplish such an object by means admitedly employed in this case, would be a reproach the upon justice. We feel that if such question can be properly presented to, and fully considered by this court, on rehearing it must arrive at the conclusion that the supreme court of Nebraska was right in holding that the plaintiff's demurrer to the answer was properly overruled and that its judgment should be affirmed.

Defendant, therefore, prays that he be granted a rehearing in this case.

F. M. CURRIE.
By E. J. CLEMENTS, his attorney.

I hereby certify that, in my opinion, the foregoing petition for a rehearing, is well founded in point of law, and that a full presentation and consideration on rehearing, of the point on which this case was decided, should cause the court to reach a different conclusion than that stated in its opinion.

E. J. Clements

Counsel for Defendant in Error.

Supreme Court of the United States.

No. 205.—October Term, 1904.

Edward Jaster, Senior, Plaintiff in Error, vs. F. M. Currie. } In Error to the Supreme Court of the State of Nebraska.

[April 24, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought by the plaintiff in error in Nebraska upon a judgment recovered by him against the defendant in error in Ohio. To this the defendant pleads that the plaintiff had brought a previous action in Nebraska for the same cause and afterwards served notice upon the defendant's attorney that the plaintiff's deposition would be taken in Ohio at a certain place on September 5, 1899, for use in the cause; that defendant was advised by his attorney to be present and went to Ohio for that purpose only; that the deposition was taken and the defendant then went to his father's house in the same county for the night of September 5, and that on September 8, in the early morning, being the earliest time convenient for leaving his father's for Nebraska, he took the train back. The writ in the Ohio suit was received and served on September 7. It is alleged that the notice to take the deposition was simply a ruse, and was given for the purpose of enticing the defendant into Ohio and for no other reason. There was a motion to set aside the service in the Ohio Court, which was overruled, 66 Ohio St. 661, but the defendant alleges that at that time he had not discovered what he styles the fraud perpetrated upon him. There was a general demurrer to this answer, which was overruled, and judgment was given for the defendant. This judgment was affirmed by the Supreme Court of Nebraska, Neb. , 94 N. W. Rep. 995, and thereupon the case was brought here on the ground that due faith and credit had not been given to the Ohio record, as required by Art. 4, § 1, of the Constitution of the United States. *Huntington* v. *Attrill*, 146 U. S. 657. *Jacobs* v. *Marks*, 182 U. S. 583.

The Supreme Court of Nebraska affirmed the judgment on the ground that in that State the distinction between actions at law and suits in equity had been abolished, that the decision in *Christmas* v. *Russell*, 5 Wall. 290, was limited to legal defences, 5 Wall. 304, 306, and that fraud would have been an equitable defence to the judgment in Ohio, and therefore was in Ne-

braska. We take up the question on this footing, without stopping to discuss the premises, which we find it unnecessary to do, and we will assume that on general demurrer a plea that the judgment was obtained by fraud would be a good equitable plea. See 5 Wall. 303.

It is assumed that the service of the writ in Ohio would have been good but for the alleged fraud. *Smythe* v. *Banks*, 4 Dall. 329. *Chaffee* v. *Jones*, 19 Pick. 260. That point must have been decided by the Ohio Courts. Moreover, the facts constituting the fraud are set forth and gain no new force from the vituperative epithet. If the inducement to enter the State of Ohio furnished by the notice to take a deposition there was made fraudulent by the motive with which the notice was given, then there was fraud, otherwise there was not. On the face of the answer fraud is simply the pleader's conclusion from the specific facts. The question is whether the motive alleged can have the effect supposed.

It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plaintiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word fraud may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where therefore, as a matter of substantive law, if not of pleading, the act was thought to need a justification, see *Aikens* v. *Wisconsin*, 195 U. S. 194, 204, or else where the intent was to do a further and unlawful act to which the act done was the means. *Swift* v. *United States*, 196 U. S. 375, 396.

It is hard to exhaust the possibilities of a general proposition. Therefore it may be dangerous to say that doing an act lawful in itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it does not usually have that result, and that the case at bar is not an exception to the general rule. We must take the allegations of the answer to be true, although they are manifestly absurd. The plaintiff could not have known that the defendant's lawyer would advise him to go to Ohio, and that the defendant would go to his father's house, instead of to Nebraska, when his business was over. But we assume, as far as possible, that the anticipation of these things was the sole inducement for giving the notice and taking the deposition. Still the

notice was true, and the taking of the deposition needed no justification. It could be taken arbitrarily, because the plaintiff chose. On the other hand, the defendant could be served with process if he saw fit to linger in Ohio. That also the plaintiff could do arbitrarily, because he chose, if he thought he had a case. He arbitrarily could unite the two acts, and do the first because he hoped it would give him a chance to do the last.

Judgment reversed.

Mr. Justice McKenna and Mr. Justice Day concur in the result.

True copy.

Test:

Clerk Supreme Court, U. S.